EDITOR'S NOTE

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tatus: GRANTED

ocketed:
ay 2, 1986

Title: Thomas West, Petitioner
v.
Conrail, et al.

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Levy,Paul Alan

Counsel for respondent: Birney,William J., Ciancia,James J., Amerman,Lucy S., Golc,Laurence

ntry	Date	Note	Proceedings and Orders
1	Mar 26 1986		Application for extension of time to file petition and order granting same until May 5, 1986 (Brennan, March 27, 1986).
2	May 2 1986	G	Petition for writ of certiorari filed.
3	May 29 1986		Brief of respondent New Jersey Transit in opposition filed.
4	Jun 2 1986		Brief of respondents Bhd. of Maintenance - Way Employees, et al. in opposition filed.
6	Jun 4 1986		Order extending time to file response to petition until June 5, 1986.
7	Jun 5 1986		Brief of respondent Conrail in opposition filed.
8	Jun 10 1986		DISTRIBUTED. June 26, 1986
9	Jun 30 1986		Petition GRANTED.
			**********
10	Aug 6 1986		Record filed.
12	Aug 6 1986		Order extending time to file brief of petitioner on the merits until September 15, 1986.
13	Aug 5 1986	G	Motion of petitioner to dispense with printing the joint appendix filed.
14	Sep 15 1986		Brief of petitioner Thomas West filed.
15	Sep 24 1986		Motion of petitioner to dispense with printing the joint appendix GRANTED.
17	Oct 9 1986		Order extending time to file brief of respondent on the merits until November 14, 1986.
18	Oct 17 1986		Brief of respondent New Jersey Transit filed.
19	Nov 14 1986		Brief of respondents Bhd. of Maintenance - Way Employees, et al. filed.
20	Nov 14 1986		Brief of respondent Conrail filed.
21	Nov 25 1986		CIRCULATED.
22	Dec 19 1986		SET FOR ARGUMENT. Wednesday, February 25, 1987. (4th case).
23	Feb 17 1987	X	Reply brief of petitioner Thomas West filed.
24	Feb 25 1987		ARGUED.

(1)

85-1804

No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

May 2, 1986

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

QUESTION PRESENTED*

Are actions involving the federal duty of fair representation sufficiently unique to warrant creating an exception to the general rule that in federal question cases the filing of a complaint, not completion of service, satisfies the statute of limitations?

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*All parties to the proceeding in the court below are listed in the caption.

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 85-

THOMAS WEST,

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CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thomas West petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 14a to 17a of the appendix to this petition ("App. 14a-17a"). The court of appeals' opinion is reported at 780 F.2d 361 and is reprinted at App. 1a to 13a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was issued on December 31, 1985. App.18a. On March 27, 1986, Justice Brennan extended the time for filing a petition for the writ of certiorari until May 5, 1986. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure provides:

A civil action is commenced by filing a complaint with the court.

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of sha'l have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

STATEMENT

Petitioner Thomas West was employed as a mechanic by respondent Consolidated Rail Corporation ("Conrail"), and was represented in collective bargaining by respondent Local 2906 of the Brotherhood of Maintenance of Way Employees ("Union"). In November, 1981, as petitioner was leaving a company truck in which he had been riding in the back seat, four bottles of beer were found in the front seat. Despite petitioner's spotless record, and his assertion that he was unaware that there had been any beer in the truck, petitioner was fired six days later. Over the next 28 months, petitioner was repeatedly assured by respondent Anthony Vincent, a Union representative, that although the appeal of his termination had been delayed, an appeal was being pursued, and that the Union would obtain both reinstatement and back pay for him. During this time, petitioner accepted an offer of reinstatement from Conrail, but the back-pay issue remained unresolved. On March 25, 1984, petitioner first became aware that, in fact, his union representative was not pursuing the matter, and that there was little, if any, chance that any further appeals would be taken.

On September 24, 1984, petitioner filed a complaint alleging that respondent Conrail discharged him in violation of the collective bargaining agreement, and that respondents Union and Vincent had breached their duty of fair representation by their failure to pursue his grievance. Respondent New Jersey Transit was named as a defendant as a successor in interest to Conrail. The summonses and complaints were mailed to respondents on October 10, 1984, pursuant to Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure, and respondents acknowledged service on dates ranging from October 12, 1984, through November 1, 1984. For the purposes of this proceeding, it is undisputed that

September 24, 1984, when the complaint was filed, was less than six months after the statute of limitations began to run, and that both October 10, when the complaints were mailed, and October 12, when the first acknowledgement was made, were more than six months after the statute began to run.

Respondents moved for summary judgment on the ground that the action was barred by the six-month statute of limitations, borrowed by this Court from section 10(b) of the National Labor Relations Act to govern hybrid actions under the duty of fair representation and section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Respondents argued, and the district court agreed, that because section 10(b) requires unfair labor practice charges to be served on the respondents, as well as filed with the National Labor Relations Board, within six months, a fair representation complaint must also be served on all defendants as well as filed with the district court within the limitations period. App. 17a.

A divided panel of the Court of Appeals for the Third Circuit affirmed. The majority recognized that the general rule for federal question lawsuits is that the action is commenced, and the statute of limitations tolled, by filing the complaint. It noted, however, that most courts addressing the question in fair representation cases had required service as well as filing within six months. App. 4a. It concluded that this Court's decision in *Del Costello* was based on the balance of interests struck by Congress in section 10(b), and that balance required both filing and service within six months. App. 6a.

Judge Gibbons dissented. In his view, neither the district court, nor any of the decisions on which the majority relied, had analyzed the question, but had merely assumed that this Court in *DelCostello* intended to require adoption of all of section 10(b), not just its limitations period. App. 9a. He declined to follow that approach for several reasons. First, he noted, section 10(b) only requires service of a simple charge filed by the injured party within six months, although a substantial amount of time may pass before the respondent learns that the agency has decided that there is reason to believe that the statute was violated and

therefore will actually file a complaint against it. App. 10a. Moreover, the notice functions performed under the NLRA by section 10(b)'s service requirement are met in federal court by Rules 4(a) and 4(j) of the Federal Rules of Civil Procedure, which assure prompt service. App. 10a-11a. Thus, although it was necessary to turn to section 10(b) to "borrow" a statute of limitations to fill a gap in federal law, Judge Gibbons concluded that there is no gap in federal law—and thus no need to borrow any rules—regarding the end of the running of the statutory period. App. 12a. Finally, Judge Gibbons observed that by adhering to the requirements of the Federal Rules, and not adopting the rest of section 10(b), the courts would maintain a uniform federal procedure and decrease uncertainty by establishing an easily ascertainable point to measure the ending of the limitations period. App. 11a-12a.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF LAW WHICH REQUIRES RESOLUTION BY THIS COURT, AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER LOWER COURTS.

In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), this Court decided that in fair representation suits such as this, courts should borrow the six-month statute of limitations from section 10(b) of the NLRA as the most appropriate limitations period for actions of this kind. Although the length of the limitations period is now settled, the question of what event stops the running of the statute is causing substantial litigation in the federal courts and requires resolution by this Court. Thus, the decision below is in direct conflict with rulings of the Court of Appeals for the Sixth Circuit, *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *cert. pending*, No. 85-1400, and of the District Court for the Southern District of Iowa, in a case now on interlocutory appeal, *Thompsen v. UPS*, 608 F. Supp. 1244 (S.D. Ia. 1985), *app. pending*, No. 85-1830 (8th Cir., argued February 13, 1986). On

the same side as the court below are two others courts of appeals, *Simon v. Kroger Co.*, 743 F.2d 1544 (11th Cir. 1984), *cert. denied with three Justices dissenting*, 105 S. Ct. 2155 (1985), and *Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); a district court decision now submitted for decision on appeal, *Ellenbogen v. Rider Maint. Corp.*, 621 F. Supp. 324 (S.D.N.Y. 1985), *app. pending*, No. 85-7926 (2d Cir., argued April 14, 1986); and various other district court rulings.

If this were a suit under any other federal statute, there would be no question that the statute of limitations would have been tolled by the filing of the complaint, notwithstanding the failure to obtain service for several additional weeks. Thus, outside of the fair representation area, every court of appeals which has considered the question has held that Rule 3 of the Federal Rules determines when the statute of limitations is tolled for federal claims. *Bomar v. Keyes*, 162 F.2d 136, 140-141 (2d Cir. 1947); *Moore Co. v. Sid Richardson Carb. & Gas Co.*, 347 F.2d 921, 924 (8th Cir. 1965); *United States v. Wahl*, 583 F.2d 285, 287-288 (6th Cir. 1978); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1188 (5th Cir. 1980); *Jordan v. United States*, 694 F.2d 833, 837 n.7 (D.C. Cir. 1982); *Metropolitan Paving Co. v. Operating Engineers*, 439 F.2d 300, 306 (10th Cir. 1971); 2 *Moore's Federal Practice* ¶ 3.07[4.-3-2], at 3-113 to 3-126 (1986). Although this Court has described the applicability of Rule 3 to toll the statute in federal question cases as an open question, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 n.11 (1980), it has ruled, without adverting to *Walker*, that Rule 3 determines whether a Title VII action is commenced within the limitations period. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 (1984).

The question, then, is whether *DelCostello* requires the creation of an exception for fair representation suits. The court below believed that such an exception was compelled simply because this Court did not specify that only the six-month filing requirement, and not the service requirement, was being borrowed. In fact, however, the only question presented in *DelCostello* was which limitations period to borrow, and the

Court chose a period which it believed was long enough to permit individual workers to protect their rights, without being so long as to permit grievance settlements to linger for years without becoming final. *DelCostello* cannot be read as establishing any rule regarding when the statute is tolled, not to speak of requiring a departure from the procedures applicable to other federal question cases.

In fact, *DelCostello*, suggests just the opposite. In it, this Court rejected a three-month limitations period because of the circumstances in which fair representation suits must be initiated—an unsophisticated worker, who has recently been discharged and thus lacks the resources to readily hire an attorney, must determine whether his rights have been violated and draft a complaint which meets the requirements of Rules 8 and 11 of the Federal Rules. Thus, it concluded, requiring that suits be filed within a period of time substantially less than six months could easily prevent the filing of many meritorious cases. 462 U.S. at 167. And yet, because several weeks may be required to effect service of the summons and complaint, the adoption of section 10(b)'s service requirement would force employees to file their suits well in advance of the expiration of the six-month period. Moreover, because unions are unincorporated associations which lack registered agents for service of process, they are served by personal delivery to an officer. If compliance with the six-month statute of limitations depends on completion of such personal service, union officers would have every incentive to be "out of the office" any time a process server appeared. Thus, applying the NLRA service rule to federal court complaints could so shorten the effective time to file as to seriously endanger the vindication of employee rights *vis-a-vis* their unions and undermine the "bulwark to prevent arbitrary union conduct" crafted by this Court in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166, 1171 (6th Cir. 1985); *Simon v. Kroger Co.*, 105 S.Ct. 2155, 2156 (1985) (per Justices White, Brennan, and Marshall, dissenting from the denial of certiorari).

Moreover, service upon the union will frequently be effected

at a different time than on the employer, thus creating a realistic possibility that the statute will have run against one but not the other defendant in a fair representation case. In *DelCostello,* however, the Court borrowed the six-month period in section 10(b) for the very purpose of assuring that the same limitation period would apply to both halves of the case. 462 U.S. at 169 n.19. Borrowing the service requirement would thus be contrary to the underlying purpose of *DelCostello* in this way as well.

Adoption of the service requirement in section 10(b) would also presumably bring with it the Labor Board's rules on how service is to be accomplished and other related aspects of Board law. But that would eliminate the advantages of uniformity in federal civil practice, which was a principal goal of the Federal Rules of Civil Procedure. Thus, the purpose of the Rules was to have one set of procedures for every kind of case in the federal courts so that everyone concerned—judges, counsel, and parties—would have a ready point of reference to determine what was required of each of them. This objective would be undermined if a special set of rules for service were created in fair representation cases.

In *Simon v. Kroger Co.*, 105 S. Ct. 2155 (1985), three Justices explained why service should not be required within the six-month period and voted to resolve the "service v. filing" issue that was presented in that case, despite the fact that there was not yet a split in the circuits. Although some of the lower courts have taken this caution to heart, most have simply continued to assume that *DelCostello* requires application of the service requirement of section 10(b). The division among the lower courts guarantees that the question will not simply go away, and litigation of this issue is consuming increasing resources in federal district and appellate courts across the country. The division among the lower courts has now reached sufficient proportions that this Court's intervention is required. Because adoption of the rule requiring service within six months may endanger the enforceability of the duty of fair representation, the Court should accept the issue for review now, and rule that filing a complaint is sufficient to toll the statute of limitations in fair representation cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

May 2, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5129

THOMAS WEST,

Appellant,

vs.

CONRAIL, A FOREIGN CORPORATION; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL NO. 2906, A FOREIGN CORPORATION; NEW JERSEY TRANSIT, A CORPORATION OF THE STATE OF NEW JERSEY; and ANTHONY VINCENT

On Appeal from the United States
District Court for the
District of New Jersey - Trenton
(D. C. Action No. 84-3925)

Submitted Under Third Circuit Rule 12(6)
December 6, 1985
(Filed December 31, 1985)

Before: ADAMS, GIBBONS, and STAPLETON,
Circuit Judges

Louis B. Youmans
Allen K. Mukaida
1901 N. Olden Avenue, Ext.
Trenton, NJ 08618

Attorneys for Appellant

Lucy S. L. Amerman
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Attorney for Appellee
Consolidated Rail Corporation

J. Charles Sheak
Brener, Wallack & Hill
204 Chambers Street
Princeton, NJ 08540

William Birney
Highsaw & Mahoney
1050 Seventeenth St., NW
Suite 210
Washington, D.C. 20036

Louis P. Malone III
General Counsel
Brotherhood of Maintenance
of Way Employees
400 First Street, NW
Room 801
Washington, D.C. 2001

Attorneys for Appellee
Brotherhood of Maintenance
of Way Employees

Irwin I. Kimmelman
Attorney General of New Jersey
Robert H. Stoloff
Deputy Attorney General
McCarter Highway & Market Street
P. O. Box 10009
Newark, NJ 07101

Attorneys for Appellee
New Jersey Transit Corporation

OPINION OF THE COURT

STAPLETON, *Circuit Judge*

Appellant filed a complaint with the District Court on September 24, 1984, alleging a hybrid breach of contract/breach of the duty of fair representation claim against his employer-railroad, his union, and a union representative. The parties agree, for purposes of this appeal, that the appellant's cause of action accrued on March 25, 1984. Appellant thus filed his complaint within six months of the accrual of his cause of action. Appellant, however, failed to mail his complaint to the defendants until October 11, 1984.

In *Sisco v. Conrail*, 732 F.2d 1188 (3d Cir. 1984), we held that the six-month statute of limitations period of Section 10(b) of the National Labor Relations Act applied to a claim of unfair representation brought under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976). We there followed *DelCostello v. Intl. Brotherhood of Teamsters*, 462 U.S. 151 (1983), which applied the limitations period of 10(b) to hybrid section 301/fair representation actions. The parties agree that 10(b) governs this complaint. They disagree, however, on whether service of process must occur within six months of the accrual of the cause of action or whether filing the complaint tolls the limitations period. The court below determined that both filing and service of process must be completed within six months, and consequently granted defendants' motions for summary judgment. We affirm.

Section 10(b) provides: "No complaint shall issue based upon any unfair labor practice occuring more than six months prior to the filing of the charge with the board *and the service of a copy thereof upon the person against whom such charge is made*"

(emphasis supplied). Thus, under 10(b) the filing of the complaint with the National Labor Relations Board does not toll the limitations period. Instead, a copy of the charge must also be served on the defendants within the limitations period; service may be accomplished simply by mailing the copy. *See* 29 CFR § 102.113(a) (1984). In contrast, the general rule for a federal suit is that the

> action is commenced, and the statute of limitations tolled, upon the filing of the complaint. See, *e.g.*, *Hobson v. Wilson*, 737 F.2d 1, 44 (CADC 1984); Fed.Rule Civ.Proc. 3; 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 3.07[4.-3-2] (1984). While the time for service of process is not open-ended, see Fed.Rules Civ.Proc. 4(a), 4(j), it need not occur within the limitations period.

Simon v. Kroger Co., 105 S.Ct. 2155 (1985) (White, J., dissenting from denial of *cert.*).

A majority of the courts that have addressed the question here presented have, like the court below, found that where the six month limitations period of 10(b) governs, the tolling provision of that section also applies. *See Williams v. Greyhound Lines, Inc.*, 756 F.2d 818 (11th Cir. 1985); *Dunlap v. Lockheed Georgia Co.*, 755 F.2d 1543 (11th Cir. 1985); *Simon v. Kroger Co.*, 743 F.2d 1544, *reh'g denied*, 749 F.2d 733 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 2155 (1985); *Howard v. Lockheed Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Ellenbogen v. Rider Maintenance Corp.*, No. 84 Civ. 3513 (RLC), slip op. (S.D.N.Y. Oct. 28, 1985); *Waldron v. Motor Coils Manufacturing Co.*, 606 F.Supp. 658 (W.D. Penn. 1985); *Thompson v. Ralston Purina Co.*, 599 F.Supp. 756 (W.D. Mich. 1984); *Hoffman v. United Markets, Inc.*, 117 L.R.R.M. 3229 (N.D. Cal. 1984). *But see Simons v. Kroger Co.*, 105 S.Ct. 2155 (1985) (White, J., dissenting from denial of

cert.); *Thomsen v. United Parcel Service*, 608 F.Supp. 1244 (S.D. Iowa 1985); *LaTondress v. Local No. 7, I.B.T.*, 102 F.R.D. 295 (W.D. Mich. 1984); *Williams v. E.I. Dupont de Nemours Co.*, 581 F.Supp. 791 (M.D. Tenn. 1983).

In *Sisco* we found that 10(b) "represents Congress' evaluation of the appropriate balance of interests between the need for prompt resolution of disputes on the one hand, and the interest in assuring adequate representation of employees on the other." *Sisco*, 732 F.2d 1188, 1193. Similarly, in *DelCostello* the Supreme Court stated:

> At least as important as the similarity of the rights asserted in the two contexts, however, is the close similarity of the considerations relevant to the choice of a limitations period. As Justice Stewart observed in (*United Parcel Service, Inc. v. Mitchell*):
>
> > "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case...'[t]he need for uniformity' among procedures followed for similar claims...as well as the clear congressional indication of the proper balance between the interests at stake, counsels for adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." (451 U.S. at 70-71)(footnote omitted).

Delcostello, 462 U.S. at 170-71 (quoting *Mitchell*, 451 U.S. 56, 70-71 (1981)(Stewart, J., concurring)).

The balance struck by Congress and recognized in *DelCostello* is reflected in the language of 10(b), which unambiguously requires both filing *and* service of process within six months of the accrual of the cause of action. We are reluctant to upset that balance by grafting Fed. Rule Civ. Proc. 4(j) onto 10(b), particularly since doing so would increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition.

While it is true, as Judge Gibbons notes, that the complaint in an unfair labor practice proceeding is filed by the General Counsel after an investigation of the employee's charge, it is the filing and service of the charge that notifies the employer of the charge and initiates the dispute resolution process in such a proceeding. The filing and service of the complaint performs the same function in a hybrid labor suit like the one before us. Section 10(b) promotes the prompt resolution of labor disputes by requiring an early initiation of the dispute resolution process and *DelCostello* teaches that this policy should be implemented in hybrid labor suits as well. That policy is best served by borrowing the service requirement, as well as the filing requirement, of Section 10(b).

The final order of the district court will be affirmed.*

GIBBONS, *Circuit Judge*, dissenting:

Thomas West appeals from an order dismissing his suit against his employer and union, alleging that the employer had breached the collective-bargaining

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* Appellant also contends that application of the tolling provision denies him equal protection of the law. We are unpersuaded.

agreement and that the union had breached its duty of fair representation. The district court dismissed because service of process had not been completed before the running of the applicable statute of limitations.

Both breaches were claimed to be violations of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982). In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Supreme Court held that the applicable statute of limitations for such hybrid suits under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), was the six-month limitation found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982). As Judge Stapleton notes, this court, following the reasoning of *DelCostello*, has applied section 10(b)'s six-month limitation period to hybrid Railway Labor Act cases. *See Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1193 (3d Cir. 1984). The issue presented on this appeal is whether section 10(b)'s additional requirement that service of process be completed within the six-month period is also applicable to a hybrid breach of contract/breach of fair representation suit brought in federal district court.

The pertinent facts of this case are not in dispute. Thomas West, the plaintiff, was fired by Consolidated Rail Corporation on November 27, 1981, after four bottles of beer were discovered in a truck that West had been riding in. West disclaimed knowledge of the alcoholic beverages and requested his union, the Brotherhood of Maintenance of Way Employes, to appeal his grievance. For the next twenty-eight months the union gave West a variety of excuses for not processing his appeal. Finally, on March 25, 1984 West discovered that the union official responsible for his appeal was not pursuing the matter, and that there was little chance that his grievance appeal would be

acted on. West, therefore, filed suit against his employer and union in the United States District Court for the District of New Jersey. Although the suit was filed within six months of West's alleged discovery of the inaction by his union (September 24, 1984), copies of the complaints and summonses were not mailed until October 10, 1984, and the various defendants did not receive those documents until sometime between October 12th and October 22nd. Holding that at best the six-month limitations period expired on September 25, 1984, the district court concluded that section 10(b) of the National Labor Relations Act required both filing and service within six months, and it dismissed the complaint as time-barred.

Hybrid claims for breach of contract/breach of duty of fair representation are federal causes of action. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 561-64 (1976). While breach of contract claims against employers are expressly provided for in the Labor Management Relations Act, 29 U.S.C. § 185 (1982), breach of duty of fair representation claims against unions are implied from the Railway Labor Act and the National Labor Relations Act. *See Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202 (1944); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Because there is no federal statute of limitations expressly applicable to such suits, the Supreme Court "borrowed" the six-month period of section 10(b) of the National Labor Relations Act as the closest analogous time bar. *See DelCostello*, 462 U.S. at 158. In making such a "borrowing" the question arises whether the Court intended to borrow just the period itself or the period along with its requirement of filing and service.

The district court, relying on two decisions by the Court of Appeals for the Eleventh Circuit, *see Simon v. Kroger Co.*, 745 F.2d 1544 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2155 (1985); *Howard v. Lockheed-Georgia*

Co., 742 F.2d 612 (11th Cir. 1984), and a decision by a district court in California, *see Hoffman v. United Market Inc.*, 117 LRRM 3229 (N.D. Cal. 1984), concluded that the *DelCostello* Court had adopted both the section 10(b) six-month period and its filing and service requirements. *See West v. Conrail*, No. 84-3925 (D.N.J. Feb. 4, 1985) (opinion read into transcript), *reprinted in* Joint Appendix at 16, 22. Neither the district court nor the decisions it and the majority rely upon, however, analyzed the question further than to make this assumption of complete adoption.[1] *See West*, No. 84-3925, reprinted *in* Joint Appendix at 22-23; *Simon*, 743 F.2d at 1546; *Howard*, 742 F.2d at 614; *Hoffman*, 117 LRRM at 3230.

Section 10(b) of the National Labor Relations Act establishes the procedural mechanism for instituting and prosecuting an unfair labor practice complaint before the National Labor Relations Board, 29 U.S.C. § 160(b). Under this section, an aggrieved person may initiate a charge with the Board, *see* 29 C.F.R. § 102.9 (1985), but only the Board's General Counsel, after investigation, is empowered to issue and prosecute a complaint. *See* 29 U.S.C. § 153(d) (1982). When first enacted in 1935, the National Labor Relations Act contained no time period within which a charge had to be filed. *See* National Labor Relations Act, ch. 372, 49 Stat. 449, 453-54. Consequently, long delays between the alleged unfair labor practice and filing of the charge

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1. Defendants-Appellants cite two other cases that have held that *DelCostello* impliedly required both filing and service within the six-month period. *See* Dunlap v. Lockheed-Georgia Co., 755 F.2d 1543 (11th Cir. 1985); Thompson v. Ralston Purina Co., 599 F. Supp. 756 (W.D. Mich. 1984). Both of these cases, however, simply follow the earlier Eleventh Circuit decisions without further analysis. *See Dunlap*, 755 F.2d at 1543-44. *Thompson*, 599 F. Supp. at 758.

were allowed. *See Phelps Dodge Corp. v. NLRB*, 113 F.2d 202, 206 (2d Cir. 1940), *modified on other grounds*, 313 U.S. 177 (1941). With no knowledge of the unfair labor practice the General Counsel could not commence a timely investigation and a charged party would not realize that an investigation might occur. This problem was corrected by the addition of a six-month period for filing charges when the National Labor Relations Act was amended by the Taft-Hartley Act in 1947. *See* National Labor Relations Act, ch. 120, 61 Stat. 136, 146. The six-month limitation, however, applies only to the filing of the charge, not the issuance of the complaint. *See NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 732 (7th Cir. 1983); *Proctor & Gamble Manufacturing Co. v. NLRB*, 658 F.2d 968, 985 (4th Cir. 1981), *cert. denied*, 459 U.S. 879 (1982). Thus section 10(b) is not, technically, a statute of limitations. It does not determine when the government, which alone may prosecute an unfair labor practice charge, may do so. There can still be substantial delay between the filing of the charge and the filing of the complaint because the charge only sets the investigation in motion. *See NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959).

The requirement of service within the limitation period is unique to the National Labor Relations Act administrative proceedings where the General Counsel, not the complaining party, decides whether to file and prosecute the actual complaint. No analogous need is present in an action in federal district court. In federal court, Rule 3 in conjunction with Rule 4(a) and (j) of the Rules of Civil Procedure govern this situation. Rule 3 by commencing the action upon filing, and Rule 4 by assuring that the complaint and summons are promptly served upon the defendant. Hence, borrowing a service of process requirement from the administrative process in hybrid

breach of contract/breach of duty of fair representation suits is unnecessary.

More than being unnecessary, however, requiring service within the six-month period would create procedural conflicts and uncertainty. Unlike diversity suits,[2] in cases based on federal question jurisdiction, where there is no express statutory limitations period, federal courts have generally used filing pursuant to Rule 3 as the point for ending the running of the borrowed limitations period. *See, e.g., Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1188 (5th Cir. 1980) (filing ends the running of a statute of limitations in a section 1983 suit); *Metropolitan Paving Co. v. International Union of Operating Engineers*, 439 F.2d 300, 306 (10th Cir. 1971) (filing ended the limitations period in an action under the Labor Management Relations Act), *cert. denied*, 404 U.S. 829 ; *Ratcliffe v. Insurance Co. of North America*, 482 F. Supp. 759, 763 (E.D. Pa. 1980) (filing ends the limitations period in an Equal Employment Opportunity suit); *see also* 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056 (1969).

There are two arguments for using such an approach in hybrid labor suits. First, it maintains a uniform federal procedure and decreases uncertainty by establishing an easily ascertainable point to

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2. Although the *Erie* doctrine requires that federal courts apply the state rule for satisfying a statute of limitations period in diversity cases, *see Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980), the Supreme Court has expressly distinguished and left open "the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law." *Id.* at 751 n.11. Unlike a diversity suit, there are no potential tenth amendment issues, and we are, therefore, free to examine the reasons arguing against adopting section 10(b)'s service requirement

measure the ending of the limitations period.[3] There is a strong forum interest in such uniformity. Second, consistent with the Supreme Court's rationale in *DelCostello*, it borrows only what is necessary to fill the gap in federal statutory law. As the *DelCostello* Court explained, "[W]e are applying a statute of limitations to a different cause of action, not because the legislature enacting that limitations provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law." 462 U.S. at 170 n.21. While there was a gap as to the length of the limitations period for breach of contract/breach of duty of fair representation suits, there was, and is, no gap as to the procedure for ending the running of the statutory period. Rule 3 serves as the controlling provision.[4] *See Metropolitan Paving Co.*, 439 F.2d at

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3. Requiring service of process within the six-month period entails the problem of determining when service was performed. The instant case presents a good example. The complaints and summonses were mailed on October 10, 1984, but the various defendants received them on October 12th, October 15th, October 20th, and October 22nd. Although the National Labor Relations Board has established the time of mailing as the controlling time in unfair labor practice proceedings, *see* 29 C.F.R. § 102.113(a) (1985), using this period in federal court would require additional "borrowing." Moreover, since mailing does not actually notify the defendant, the Board's mailing rule indicates that the real purpose of section 10(b)'s service requirement is to ensure prompt service. In federal courts, this promptness, to the degree deemed necessary, is already ensured by Rule 4(a).

4. Significantly, in applying the six-month period of section 10(b) to the two consolidated cases under consideration in *DelCostello*, the Court focused on the time of *filing* and never mentioned the time of service. *See* 462 U.S. at 172 ("In No. 81-2408, it is conceded that the suit was *filed* more than 10 months after respondent's cause of action accrued. . . . The situation is less clear in No. 81-2386. Depending on when the joint committee's decision is thought to have been rendered, the suit was *filed* some seven or eight months afterwards.") (emphasis supplied).

306; *Williams v. E.I. duPont de Nemours Co.*, 581 F. Supp. 791, 792 (M.D. Tenn. 1983).

Consequently, filing pursuant to Rule 3 should be all that is required to end the running of the six-month limitations period applicable to hybrid labor cases. The order appealed from should, therefore, be reversed and the case remanded for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 84-3925 (JWB)

TRANSCRIPT OF PROCEEDINGS

THOMAS WEST,
Plaintiff,

v.

CONRAIL, A FOREIGN CORPORATION; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL NO. 2906, A FOREIGN CORPORATION; NEW JERSEY TRANSIT, A CORPORATION OF THE STATE OF NEW JERSEY; and ANTHONY VINCENT,
Defendants.

Trenton, New Jersey
February 4, 1985

BEFORE:
THE HONORABLE JOHN W. BISSELL, U.S.D.J.

This Court feels, frankly, that if and when confronted with the issue presently before the Court, and indeed it may be in Eleventh Circuit, namely Howard versus Lockheed-Georgia, Simon versus Kroger and the decision from the Northern District of California in Hoffmann v. United Markets, Inc., are the only ones that have addressed and which shed light on this issue directly. The Third Circuit, of course, has adopted the Del Costello rule as indicated, of course, in Sisco versus Conrail, and applied it to the Railway Labor Act.

This Court feels, frankly, that if and when confronted with tthe issue presently before the Court, and indeed it may be in this case, the U.S. Court of Appeals for the Third Circuit would agree with the Eleventh that if the statute is to be borrowed, it is to be borrowed in its entirety. While that may lead to some uncertainty with regard to the actual date for commencement of actions, it is not an uncertainty that can't be remedied by the establishment of a date when service is accomplished.

I realize, of course, that service of a summons and complaint in a court action is a slightly different act and process than that present in a NLRB matter. However, once again, I don't feel that it is particularly onerous and, frankly, a greater degree of confusion and uncertainty in all likelihood would result from a partial borrowing, shall we say, of Section 10(b) for purposes of filing but not for purposes of service, which I think would jeopardize the underlying thesis in Del Costello of uniformity, as Mr. Malone mentioned.

The Court accordingly grants the motion based on the statute of limitations argument. I am going to be filing with my reporter for his transcription into the Court's minutes a brief opinion disposing of this case on that ground alone. The statute of limitations issue is, of course, dispositive of the matter, requiring the dismissal of the complaint. Accordingly, the Court declines to address in an advisory capacity the other grounds for the motion.

Thank you.

* * *

This case arises out of a Complaint filed by Thomas West against his employer Conrail and Conrail's alleged successor in interest to the collective bargaining agreement in question, New Jersey Transit, alleging wrongful discharge. Also named as defendants are Mr. West's collective bargaining representative, Brotherhood of Maintenance of Way Employees, Local No. 2906 ("the Union") for breach of the duty of fair representation and Anthony Vincent, a Union representative for negligence in his representation of plaintiff. Jurisdiction of this Court was initially

premised on the Labor Management Relations Act, and pendent jurisdiction. Subsequently, the parties appear to have agreed that the Railway Labor Act 45 U.S.C. Sec. 151 *et seq.* ("RLA") is the applicable federal statute upon which to proceed.

The matter is currently before the Court on defendants' motion to dismiss the Complaint and/or for summary judgment. Plaintiff was employed by defendant Conrail as a Bridges and Buildings Mechanic from February 9, 1981 until his discharge on November 27, 1981. Plaintiff was dismissed for riding in a company truck in which four bottles of beer were found. Plaintiff contends that at no time was he aware of the existence of the alcoholic beverages in the vehicle. Upon receiving notice of his termination plaintiff contacted his union representative, defendant Vincent, and requested that the Union appeal his termination. Plaintiff was reinstated to his position, *without backpay*, on February 9, 1984.

All defendants move to dismiss the Complaint for failure to comply with the applicable statute of limitations. However, as the parties have relied upon material outside of the pleadings this motion shall be treated as one for summary judgement under Fed. R. Civ. P. 56. Specifically, the defendants contend that the plaintiff filed and served his Complaint outside the six month statute of limitations recognized by the Supreme Court in *Del Costello v. Teamsters*, __ U.S. __, 103 S.Ct. 2281 (1983), and recently applied to the Railway Labor Act in *Sisco v. Conrail*, 732 F.2d 1188 (3d Cir. 1984). Initially, the defendants contend that any cause of action for breach of the duty of fair representation had to occur on or before the date of plaintiff's reinstatement, February 9, 1984. As the Complaint was not filed until September 24, 1984, more than seven months after the reinstatement, the defendants argue the six month statute had run and accordingly, the Complaint is time barred.

In opposition, the plaintiff argues that the rule governing the running of the statute of limitations is: "a limitation period begins to run 'when the claimant discovers, or in the exercise of reasonable dilligence should have discovered, the acts constituting the alleged violation,'" *N.L.R.B. v. Allied Products*

Corp., 548 F.2d 644, 650 (6th Cir. 19). Relying on his own certification plaintiff contends that he discovered that the union was making no efforts to process his grievance only in March of 1984, and accordingly, the six month statute of limitations began to run on that day.

In reply to this argument, the defendants contend the statute of limitations in question here, namely Sec. 10(b) of the National Labor Relations Act requires not only a filing of a complaint within the period. For the sake of argument defendants are willing to accept plaintiff's contention that the statute began to run in March of 1984. They argue that even using that later date the plaintiff failed to comply with the statute because the defendants were not served until approximately October 12, 1984, or later, more than six months after any claim accrued. (This was accomplished by mail from the plaintiff pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii), no delay beyond plaintiff's control.) In support of their positions, defendants cite *Howard v. Lockheed-Georgia*, 742 F.2d 612 (11th Cir. 1984); *Simon v. Kroger Company*, 743 F.2d 1544 (11th Cir. 1984); and *Hoffman v. United Markets, Inc.*, __ F. Supp. __, 117 LRRM 3229 (N.D. Cal. 1984), all of which held that both filing and service of the complaint are required to be completed within the six month period. The express language of that statement itself permits no other conclusion.

The record presently before the Court indicates that summary judgement in favor of defendants is warranted. The statute of limitations involved herein, expressly calls for both the filing and serving of the complaint to be completed within the six month period. The Courts that have recently addressed the issue have also so held. Plaintiff failed to serve the defendants within the six month period and as such his complaint is time barred. Accordingly, it is dismissed.

As the statute of limitations issue is dispositive the Court will not address the other grounds for dismissal or summary judgement raised by the defendants.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-5129

THOMAS WEST, Appellant

vs.

CONRAIL, A FOREIGN CORPORATION; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL NO. 2906, A FOREIGN CORPORATION; NEW JERSEY TRANSIT, A CORPORATION OF THE STATE OF NEW JERSEY; and ANTHONY VINCENT

(D. C. Civil No. 84-3925)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, GIBBONS and STAPLETON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) December 6, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 20, 1985, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

Sally Mrvos

Clerk

December 31, 1985

No. 85-1804

In The
Supreme Court of the United States
October Term, 1985

THOMAS WEST,
Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent,
New Jersey Transit Corporation
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(201) 648-3710

JAMES J. CIANCIA,
Assistant Attorney General
Of Counsel
Counsel of Record

JEFFREY BURSTEIN,
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals for the Third Circuit correctly affirm the District Court's dismissal of Petitioner's hybrid breach of contract/breach of duty of fair representation action based upon Petitioner's failure to satisfy the requirements of the applicable statute of limitations, 29 *U.S.C.* § 160(b)?

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No. 85-1804

In The
Supreme Court of the United States
October Term, 1985

THOMAS WEST,
Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Counter-Statement of the Case

The pertinent facts with respect to the issue before this Court were never in dispute. Petitioner Thomas West was dismissed from service with Respondent Consolidated Rail Corporation ("Conrail") on November 27, 1981, for alleged possession of alcoholic beverages (Pa16).* On February 9, 1984, Conrail reinstated Petitioner by reducing his dismissal to a suspension without back pay (Pa16).

* "Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari.

He subsequently transferred to and has since been working for Respondent New Jersey Transit Corporation, created by the New Jersey Legislature to provide public transit service. *N.J.S.A.* 27:25-1 *et seq.*

On September 24, 1984, Petitioner filed a complaint in the United States District Court for the District of New Jersey alleging breach of the collective bargaining agreement by Respondent Conrail, and breach by Petitioner's union, Respondent Brotherhood of Maintenance of Way Employees, Local No. 2906, of its duty of fair representation in not processing his grievance against Conrail (Pa3). Respondent New Jersey Transit Corporation was joined in the complaint based on an allegation that it was the successor to Conrail. The complaint was not mailed to the various defendants until October 10 or 11, 1984, and receipt of the summons was acknowledged by the various defendants between October 12, 1984 and October 22, 1984. Petitioner conceded, and all parties agreed for purposes of the action below, that the latest date on which Petitioner learned of the alleged breach of the duty of fair representation was on March 25, 1984 (Pa3, 17).

All Respondents moved for summary judgment on the ground that plaintiff failed to comply with the applicable statute of limitations for a "hybrid" breach of contract/breach of duty of fair representation action contained in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 *U.S.C.* § 160(b), which requires filing and service of the complaint within six months of accrual of

the cause of action.* Because Respondent New Jersey Transit Corporation is an instrumentality of the State of New Jersey, *N.J.S.A.* 27:25-4(a), New Jersey Transit also moved to dismiss the complaint on the grounds that the action against it was barred by the provisions of the Eleventh Amendment to the United States Constitution, and because as a matter of law and fact New Jersey Transit was not the successor to the collective bargaining agreement between Petitioner and Conrail.

The District Court granted Respondents' motion for summary judgment based on Petitioner's failure to serve defendants within six months as required by Section 10(b) of the NLRA (Pa14-17). As the complaint was dismissed against all of the Respondents on the basis that Petitioner did not comply with the applicable statute of limitations, the District Court did not rule on the additional grounds for dismissal raised by Respondent New Jersey Transit Corporation (Pa17).

The Court of Appeals for the Third Circuit affirmed, ruling that the limitations period applicable to a fair representation action as a result of this Court's decision in *DelCostello v. International Brotherhood of Teamsters, supra,* Section 10(b) of the NLRA, unambiguously requires both filing and service of process within six months

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* While labor relations between Petitioner, his union and employer are governed by the Railway Labor Act, 45 *U.S.C.* § 151, *et seq.*, not the National Labor Relations Act, the Third Circuit in *Sisco v. Conrail,* 732 *F.*2d 1188 (3rd Cir. 1984) ruled that the Section 10(b) limitation period adopted for breach of contract/breach of duty of fair representation actions by this Court in *DelCostello v. International Brotherhood of Teamsters,* 462 *U.S.* 51 (1983), also applies to fair representation claims arising under the Railway Labor Act.

of accrual of the claim (Pa.3, 6). *West v. Conrail,* 780 *F.*2d 361, 363 (3rd Cir. 1985). The Court below rejected Petitioner's argument that the service requirement of Section 10(b) should be ignored and instead be replaced by the service provisions of the Federal Rules of Civil Procedure, which Petitioner contended would toll the running of the applicable statute of limitations at the time of the filing of the complaint. The Third Circuit found that "grafting Fed. Rule Civ. Proc. 4(j) onto 10(b) . . . would increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition," contrary to the Congressional policy of prompt resolution of labor disputes (Pa6).

Summary of Argument

The decision of the Third Circuit correctly applied the requirements of 29 *U.S.C.* § 160(b) that a complaint be both filed and served within six months in cases of this type. Where service is an integral part of a borrowed statute of limitations, the borrowing includes both the statute's filing and service requirements.

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REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS WARRANTING REVIEW.

Rule 17 of this Court's Rules provides that a petition for a writ of certiorari will be granted only where there are special and important reasons. In the instant matter, no such reasons exist.

Petitioner argues that the Writ should be granted because of a confict between the decision below, and decisions of the Sixth Circuit in *Macon v. ITT Continental Baking Co.,* 779 *F.*2d 1166 (6th Cir. 1985), *cert. pending,* No. 85-1400, and the District Court for the Southern District of Iowa, *Thomsen v. United Parcel Service, Inc.,* 608 *F.Supp.* 1244 (S.D. Ia. 1985). However, a conflict between Circuit Courts of Appeal does not automatically entitle a Petitioner to a grant of certiorari. 13 *Moore's Federal Practice,* § 817.21 (2d ed. 1985). *Macon v. ITT Continental Baking Co., supra,* is the only Circuit Court decision in conflict with the ruling below that in a hybrid breach of contract/breach of duty of fair representation action, suit is timely only when a plaintiff both files and serves a complaint within the six month limitation period. In contrast, the decision below is in accord with the Ninth Circuit Court of Appeals, *Gallon v. Levin Metals Corp.,* 779 *F.*2d 1439 (9th Cir. 1986), and with the Eleventh Circuit, *Simon v. Kroger Co.,* 743 *F.*2d 1544 (11th Cir. 1984), *cert. den.* 105 *S.Ct.* 2155 (1985); *Williams v. Greyhound Lines, Inc.,* 756 *F.*2d 818 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.,* 755 *F.*2d 1543 (11th Cir. 1985); *Howard v. Lockheed-Georgia Co.,* 742 *F.*2d 612 (11th Cir. 1984).

While Petitioner notes a conflict between *Thomsen v. United Parcel Service, Inc., supra,* and the decision below, a conflict between a decision of a District Court and that of a Circuit Court of Appeals is generally not sufficient for purposes of the prerequisites to the granting of certiorari set forth in Rule 17. 13 *Moore's Federal Practice, supra.* Moreover, at least four District Courts have ruled in accordance with the Third Circuit's decision below. *Ellenbogen v. Rider Maintenance Corp.,* 621

F.Supp. 324 (S.D.N.Y. 1985); *Waldron v. Motor Coils Manufacturer Co.*, 606 *F.Supp.* 658 (W.D.Pa. 1985); *Thompson v. Ralston Purina Co.*, 599 *F.Supp.* 756 (W.D. Mich. 1984); *Hoffman v. United Market, Inc.*, 117 *L.R.R.M.* 3229 (N.D. Cal. 1984).

The situation presented by Petitioner, involving a complaint filed but not served within six months as required by Section 10(b), is neither of special significance nor likely to recur frequently. This Court has stated that the legal issue in question in a petition for a writ of certiorari must be "beyond the academic or episodic." *Rice v. Sioux City Cemetery*, 349 *U.S.* 70, 74 (1955). Respondent New Jersey Transit respectfully submits that the Petition in this case does not present "special and important" reasons warranting review.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT ON THE BASIS THAT PETITIONER FAILED TO SATISFY THE SERVICE REQUIREMENTS OF THE APPLICABLE STATUTE OF LIMITATIONS.

In *DelCostello v. International Brotherhood of Teamsters, supra,* this Court ruled that the applicable limitation period for purposes of a hybrid breach of contract/breach of duty of fair representation action against an employer and a union is governed by Section 10(b) of the National Relations Labor Act, 29 *U.S.C.* § 160(b). The plain language of Section 10(b) requires both filing *and* service of a charge within six months. *NLRB v. Local 264, Laborer's International Union*, 529 *F.*2d 778, 782 (8th Cir. 1982).

There is no reason why the six month limitation period would be borrowed without also borrowing the statute's service requirement. *Howard v. Lockheed-Georgia Co., supra,* 742 *F.*2d at 614.

Indeed, as noted by the Court below, failure to apply both the filing and service requirements of Section 10(b) in actions of this type would be inconsistent with the purposes for adoption of this limitation statute. In *DelCostello,* this Court found that the Congressional goal in enacting Section 10(b) was to balance the national interest in speedy resolution of employment disputes through the collective bargaining process with the right of employees to challenge what they viewed as unjust settlements, the same balance of interests at issue in a breach of contract/duty of fair representation action. *DelCostello v. International Brotherhood of Teamsters, supra,* 462 *U.S.* at 170-171. Thus, this Court rejected adoption of a three-year, state limitation period for legal malpractice, because borrowing such a statute of limitations "would preclude the relatively rapid final resolution of labor disputes favored by federal law." *Id.*, 462 *U.S.* at 168. As found by the Court below, substitution of the Section 10(b) requirement of filing and service within six months of accrual with *F.R.C.P.* 4(j) could extend the relatively short six month statute of limitations to ten months, "a substantial addition" for resolution of fair representation actions, contrary to one of the purposes for borrowing the Section 10(b) limitations period (Pa 6).

Petitioner, both in his Question Presented for Review and in the body of the Petition, characterizes the Third Circuit's application of both the filing and service require-

ments of Section 10(b) as "creating an exception to the general rule that in federal question cases the filing of a complaint, not completion of service, satisfies the statute of limitations." This central contention of Petitioner is plainly incorrect for a variety of reasons.

First, as conceded by Petitioner (P6), it is by no means settled that in federal question cases, the mere filing of a complaint in federal court tolls the applicable statute of limitations. As noted by this Court:

> "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." 4 C. Wright and A. Miller, *Federal Practice Procedure* § 1057, p. 191 (1969) (footnote omitted). . . .

Walker v. Armco Steel Corp., 446 *U.S.* 740, 751, n. 10 (1980). Petitioner can hardly claim that the Court below has created an "exception" to a purported "general rule," when this Court has expressly left open the question of whether the mere filing of a complaint based on a federal cause of action tolls the applicable limitation period.

More significantly, Petitioner's contention that "outside of the fair representation area," Rule 3 of the Federal Rules determines when a statute of limitations is tolled for a federal claim is plainly in error. In *Board of Regents v. Tomanio,* 446 *U.S.* 468 (1980), a case based on a federal statute, 42 *U.S.C.* § 1983, this Court reaffirmed the long practice not only of borrowing the most analogous state limitation period where the applicable federal statute contains no particular limitation provision

to govern actions under the right, but also borrowing the tolling provisions contained in the state law. *See also, Johnson v. Railway Express Agency,* 421 *U.S.* 454, 463-465 (1975) (adopting tolling provisions of state law in an action based on 42 *U.S.C.* § 1981).

While the instant case involves adoption of a limitation period established by federal, not state law, there is similarly no basis for ignoring the tolling provisions of the borrowed statute. Where a federal statute imposes additional requirements in order to commence an action, the filing of a complaint without satisfying those additional prerequisites cannot toll the limitation period. *United States v. Matles,* 356 *U.S.* 256 (1958) (where an affidavit of good cause was a statutory prerequisite to initiating an action under a federal immigration statute, the timely filing of a complaint without such an affidavit did not toll the limitations period, and the failure to file a timely affidavit could not be cured by amendment). Thus, Petitioner's contention that the decision below is "a departure from procedures applicable to other federal question cases" is wholly without merit.

Finally, without any reference to the record, Petitioner speculates that it would be difficult for "an unsophisticated worker" to comply with the service requirements of Section 10(b) because unions might be tempted to avoid service of process (P7). The lack of merit in this conjecture is underscored by the fact that Congress has expressly required employees who are the victims of *any* union unfair labor practice, as set forth in 29 *U.S.C.* § 158(b), to both file and serve the charge within six

months. 29 *U.S.C.* § 160(b)*. Moreover, the absurdity of Petitioner's policy argument concerning the difficulty of service is demonstrated by Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure, which permits service by mailing a summons and complaint, as occurred in the instant matter without any apparent difficulty (Pa 17), and by Federal Rule 4(c)(2)(D), which provides for penalties for failure to complete and return a mailed acknowledgement of service. Indeed, the six month limitation period adopted by this Court is longer than the limitation period in state arbitration statutes which had been applied by some courts to fair representation actions before the *DelCostello* decision, and provides sufficient time for even those employees "unsophisticated in collective bargaining matters" to bring a claim. *DelCostello v. International Brotherhood of Teamsters, supra,* 462 *U.S.* at 166.

For the foregoing reasons, the decision below is a logical extension of this Court's decision in *DelCostello,* and is consistent with holdings in other cases involving borrowed statutes of limitation which impose additional requirements beyond the mere filing of a complaint in order to commence an action.

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* As noted by this Court, the National Labor Relations Board has consistently held that a breach of a union's duty of fair representation is also an unfair labor practice. *DelCostello v. International Brotherhood of Teamsters, supra,* 462 *U.S.* at 170.

CONCLUSION

For the foregoing reasons, Respondent New Jersey Transit Corporation respectfully submits that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent,
New Jersey Transit Corporation

JAMES J. CIANCIA,
Assistant Attorney General
Of Counsel
Counsel of Record

JEFFREY BURSTEIN,
Deputy Attorney General
On the Brief

No. 85-1804

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON
1138 Six Penn Center Plaza
Philadelphia, Pa. 19103
(215) 977-1241

Counsel for Respondent Consolidated Rail Corporation

June 5, 1986

COUNTERSTATEMENT OF QUESTION PRESENTED

Did this Court's adoption of the six-month statute of limitations of Section 10(b) of the National Labor Relations Act for hybrid breach of contract/breach of duty of fair representation cases include the plain statutory requirement that the complaint be both filed and served in order to toll the limitations period?

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Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Consolidated Rail Corporation ("Conrail") responds to the petition of Thomas West for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in this case.

STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure and Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), are set forth in the Petition for Certiorari.

Rule 4(j) of the Federal Rules of Civil Procedure provides:

> (j) If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

COUNTERSTATEMENT OF FACTS

Respondent Conrail agrees with Petitioner that the summons and complaints in this case were mailed to Respondents on October 10, 1984, and Respondents acknowledged service on dates ranging from October 12, 1984, through November 1, 1984. For the purpose of this proceeding, it is undisputed that September 24, 1984, when the Complaint was filed, was less than six months after the statute of limitations began to run, and that both October 10, when the complaints were mailed, and October 12, when the first acknowledgement was made, were more than six months after the statute began to run.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF LAW AND SHOULD BE AFFIRMED BY THIS COURT IN ORDER TO RESOLVE THE DIRECT CONFLICT WITH DECISIONS OF OTHER LOWER COURTS.

As Petitioner has stated, this Court in *DelCostello v. Int'l. Brotherhood of Teamsters,* 462 U.S. 151 (1983), borrowed the six-month statute of limitations from Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), as the most appropriate limitation period for hybrid breach of contract/breach of duty of fair representation suits under the Labor Management Relations Act, 29 U.S.C. §185.

Subsequently, in *Sisco v. Conrail,* 732 F.2d 1188 (3rd Cir., 1984), the Court of Appeals for the Third Circuit held that the Section 10(b) statute of limitations borrowed in *DelCostello* should also apply to hybrid breach of contract/breach of duty of fair representation claims under the Railway Labor Act, 45 U.S.C. §§151-188.

In the last several years, federal courts, interpreting and applying the *DelCostello* decision, have repeatedly addressed the issue of whether or not the adoption of the 10(b) statute of limitations was intended to include its tolling provisions. (*See* Petition, pgs. 5-6.) The resulting decisions conflict.

The language of Section 10(b), on its face, requires both filing and service to toll the limitations period. In addition, adoption of the statute of limitations as a whole, including its tolling provisions, is consistent with the considered analysis of this Court in the *DelCostello* case. Accordingly, this Court should now resolve the existing conflict among circuits by affirming the lower court decision.

In *DelCostello,* this Court adopted the statute of limitations applied in unfair labor practice cases for use in the breach of contract/breach of duty of fair representation context, because of the similarity of rights asserted, and because the considerations forming the basis for the establishment of a limitations period are essentially the same in both cases.

Congress established the Section 10(b) limitations period in an effort to achieve a proper balance between the public interest in prompt and final resolution of labor disputes and the employee interest in having an unjust grievance decision set aside. *DelCostello,* 462 U.S. at 170-171 (quoting *United Parcel Service v. Mitchell,* 451 U.S. 56, 70-71 (1981) (Stewart, J. concurring)). Those same considerations prevail in the breach of contract/breach of duty of fair representation area.

Furthermore, this Court has repeatedly recognized the need for uniformity among procedures followed for similar claims. *United Parcel Service v. Mitchell, supra; DelCostello, supra.* The goals of promptness and finality in the dispute resolution process, and the need for uniformity, are met in this case only if the Section 10(b) statutory language is adopted as a whole, requiring both filing and service of the complaint before the limitations period is tolled.

Petitioner asserts that Rule 3 of the Federal Rules of Civil Procedure should govern the tolling of the limitations period at issue. (Petition, p. 6.) Nevertheless, this Court has noted that the application of Rule 3 as a tolling provision remains an open question. *Walker v. Armco Steel Corp.,* 446 U.S. 740, 751, n.10 (1980). Moreover, application of Rule 3 as a tolling provision in this case would defeat the purpose for which this Court initially borrowed the Section 10(b) statute.

Rule 3 states that an action commences when the complaint is filed. Rule 4(j) of the Federal Rules of Civil Procedure states that service of process must be made within 120 days. If Rules 3 and 4(j) were applied to an unfair representation claim, the six-month limitations period borrowed from Section 10(b) would essentially be extended to ten months.

The purpose of a limitations period is to provide a finite period of time from a date certain after which a potential defendant may legitimately rest with the knowledge that no action can be taken against him. *Walker v. Armco Steel Corp., supra.* Unlike the unfair labor practice situation under Section 10(b), a potential defendant in an unfair representation case would have to wait six months after the action accrued, plus an additional 120 days within which Rule 4(j) permits service, before being certain that a claim was time-barred. This is a significant expansion of the time period contained in Section 10(b) and totally frustrates the goals of promptness and uniformity sought by this Court.

None of the cases which Petitioner cites for the proposition that Rule 3 governs the tolling of the limitations period deals with a statute of limitations which, like 10(b), contains its own tolling provisions. The service of process requirement of 10(b) is part of the express statutory provision. This Court held early on that when the federal courts borrow a state statute of limitations, "... where the service requirement is an integral part of the borrowed state statute, the borrowing embrace[s] both the filing and service requirement...." *Ragan v. Merchants Transfer and Warehouse Co.,* 337 U.S. 530 (1949); *Ellenbogen v. Rider Maintenance Corp.,* 120 LRRM 3365 (S.D.N.Y., 1985).

Further, this Court has stated:

> "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. . . . *In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application.* (emphasis added)

Johnson v. REA, 421 U.S. 454, at 463-464 (1974).

Petitioner raises the specter that various problems will arise if service of process is required in order to toll the statute of limitations in a hybrid breach of contract/breach of duty of fair representation case. Service, however, is controlled by the person filing the charge. Petitioner's arguments that it is impractical to require service are not compelling in light of the public interest in promptness and finality of the resolution of labor disputes and the need for uniformity in limitations periods for similar causes of action.

CONCLUSION

Accordingly, Consolidated Rail Corporation respectfully requests that this Court grant the Petition for a Writ of Certiorari and affirm the lower court's decision, holding that both filing and service are required to toll the 10(b) statute of limitations in hybrid breach of contract/breach of duty of fair representation cases.

Respectfully submitted,

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON
1138 Six Penn Center Plaza
Philadelphia, Pa. 19103
(215) 977-1241

Counsel for Respondent
Consolidated Rail Corporation

APPENDIX A

Listing Pursuant to Supreme Court Rule 28.1

Consolidated Rail Corporation has no parent company. It has the following:

MAJORITY-OWNED SUBSIDIARIES

Calumet Western Railway Company
Conrail Equity Corporation
CRC Properties, Inc.
Indiana Harbor Belt Railroad Company
Merchants Despatch Transportation Corporation
Penn Central Communications Company
Pennsylvania Truck Lines, Inc.
PTL Intermodal, Inc.
St. Lawrence & Adirondack Railway Company

AFFILIATED COMPANIES

Akron & Barberton Belt Railroad Company
Albany Port Railroad Corporation
Belt Railway Company of Chicago
Chicago and Western Indiana Railway Company
Fruit Growers Express Company
Lakefront Dock & Railroad Terminal Company
Monongahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria and Pekin Union Railway Co.
Pittsburgh, Charters & Youghiogheny Railway Company
Trailer Train Company
    Calpro Company
    Delpro Company
    Hamburg Industries, Inc.
    Railbox Company

(4)

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906 AND ANTHONY VINCENT IN OPPOSITION TO THE PETITION

WILLIAM J. BIRNEY
(Counsel of Record)

WILLIAM G. MAHONEY
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Brotherhood of Maintenance of Way Employes, Local 2906 and Anthony Vincent

LOUIS P. MALONE, III
General Counsel
Brotherhood of Maintenance of Way Employes
Suite 801
400 First Street, N.W.
Washington, D.C. 20001
(202) 638-2135

June 2, 1986

13 pp

QUESTION PRESENTED

Whether the complaint in a hybrid action against an employer for breach of the collective bargaining agreement and against a union for breach of its duty of fair representation must be both filed and served within six months when the applicable statute of limitations unambiguously requires service of the complaint within six months and when the statute's service requirement furthers the public interest of promoting the prompt and final resolution of labor disputes.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906 AND ANTHONY VINCENT IN OPPOSITION TO THE PETITION

Respondents Brotherhood of Maintenance of Way Employes, Local 2906 ("BMWE") and Anthony Vincent, a BMWE representative, respectfully submit this brief in opposition to the petition of Thomas West for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

This case arises out of a so called "hybrid" action alleging violation of a collective bargaining agreement by petitioner's employer and breach of the duty of fair representation by his

union. There is no real disagreement among the parties concerning the essential facts.

From February 9, 1981 to November 27, 1981, petitioner Thomas West was employed by Consolidated Rail Corporation ("Conrail") as a Bridge and Buildings Mechanic. West, who is a member of BMWE, was represented by Local 2906.

On November 12, 1981, four bottles of beer were discovered in a company truck in which petitioner was riding, and he was dismissed from service for possession of alcoholic beverages in violation of company rules on November 27, 1981. Shortly thereafter, Anthony Vincent, petitioner's union representative, filed a grievance on petitioner's behalf seeking reinstatement and back pay. On February 9, 1984, over two years later, Conrail agreed to reinstate petitioner without back pay, and he returned to work on February 16, 1984. For the purposes of this appeal, the parties agree that petitioner's cause of action accrued on March 25, 1984, when he learned, for the first time, that BMWE was allegedly making no effort to process his claim for back pay and that there was little chance that any further appeal would be taken.

On September 24, 1984, within six months after his cause of action accrued, petitioner filed a complaint in the United States District Court for the District of New Jersey against Conrail and its successor in interest, respondent New Jersey Transit, for violation of the collective bargaining agreement and against BMWE for breach of its duty of fair representation. However, petitioner did not mail copies of the summons and complaint to respondents until October 11, 1984. Respondents acknowledged receipt of the summons and complaint on various dates from October 12 to October 22, 1984. Thus, although petitioner filed this action within six months after his cause of action accrued, he did not complete service on respondents until after the six-month statute of limitations had run.

Respondents moved for summary judgment on the ground that the six-month statute of limitations, borrowed by this Court from Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), required that the complaint be filed *and* served within six months. *See DelCostello v. Intl. Brotherhood of*

Teamsters, 462 U.S. 151 (1983). The district court agreed and ruled that petitioner's action was time-barred because the complaint was not filed and served within six months after his cause of action accrued.

A divided panel of the United States Court of Appeals for the Third Circuit affirmed the district court's decision. The court of appeals held that the complaint in a hybrid breach of contract/duty of fair representation action such as this must be filed and served within six months. The language of the statute unambiguously requires that the complaint be filed and served within six months. Moreover, the six-month statute of limitations represents the proper balance between the need for prompt resolution of labor disputes on the one hand and the interest in assuring adequate representation of employees on the other. Thus, the court of appeals properly concluded that the policy of promoting the prompt resolution of such disputes is best served by requiring both filing and service of the complaint within six months.

Judge Gibbons dissented on the ground that the requirement of service within the limitations period is, in his view, unique to administrative proceedings brought under the NLRA and has no application to hybrid breach of contract/duty of fair representation actions brought in federal district court.

ARGUMENT

I. The Decision Below Does Not Raise An Important Question Of Law Requiring Immediate Resolution By This Court.

Under well-established rules of this Court, review of a writ of certiorari is a matter of judicial discretion and will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 17. Contrary to petitioner's contention, the decision below does not involve an important question of law requiring immediate resolution by this Court.

Petitioner concedes, as he must, that the decision of the court of appeals in this case is consistent with the decisions of

two other courts of appeals that have considered and decided this issue. *See Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); *Williams v. Greyhound Lines, Inc.*, 756 F.2d 818 (11th Cir. 1985). Moreover, it is undisputed that this Court has previously refused to grant a petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to consider this very issue. *Simon v. Kroger Co.*, 105 S. Ct. 2155 (1985) (three justices dissenting), *denying cert. to Simon v. Kroger Co.*, 743 F.2d 1544 (11th Cir. 1984). In addition, several district courts have held that service of the complaint must be made within six months. *See Ellenbogen v. Rider Maintenance Corp.*, 621 F.Supp. 324 (S.D.N.Y. 1985), *app. pending*, 2d Cir. No. 85-7926 (argued April 14, 1986); *Waldon v. Motor Coils Manufacturing Co.*, 606 F.Supp. 658 (W.D. Pa. 1985); *Thompson v. Ralston Purina Co.*, 599 F.Supp. 756 (W.D. Mich. 1984); *Hoffman v. United Markets, Inc.*, 117 LRRM 3229 (N.D. Cal. 1984).

To date, only one court of appeals has ruled that service of the complaint in a hybrid breach of contract/duty of fair representation action need not be completed within six months after the cause of action accrues. *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *pet. for cert. pending*, 54 U.S.L.W. 3584 (February 21, 1986, No. 85-1400). Moreover, to the best of our knowledge, only one district court outside the Sixth Circuit has reached the same result. *Thomsen v. UPS*, 608 F.Supp. 1244 (S.D. Ia. 1985), *app. pending*, 8th Cir. No. 85-1830 (argued February 13, 1986).

In sum, the great majority of courts that have considered this issue have ruled that both filing and service of the complaint must be accomplished within the six-month time period. While the issue is currently under consideration in two other circuits, only the Sixth Circuit has held that the complaint need not be filed and served within six months, and a petition for a writ of certiorari to review that decision is now pending before this Court. *Macon v. ITT Continental Baking Co., supra.* Although we believe that the Court should issue a writ of certiorari to review the judgment of the Sixth Circuit in that case, petitioner has failed to satisfy the criteria for the issuance of a writ of certiorari in this case. At most, action on

petitioner's request for issuance of a writ in this case should be stayed pending a decision by the Court in *Macon.*

II. The Court Of Appeals Correctly Held That The Complaint In A Hybrid Action Alleging A Breach Of The Collective Bargaining Agreement And Breach Of The Duty Of Fair Representation Must Be Both Filed And Served Within Six Months.

In *DelCostello*, this Court, faced with the lack of a uniform statute of limitations governing hybrid actions such as this, "borrowed" the six-month statute of limitations found in Section 10(b) of the National Labor Relations Act ("NLRA"). 29 U.S.C. § 160(b). The statute, which governs the procedural mechanism for instituting and prosecuting an unfair labor practice complaint before the National Labor Relations Board ("NLRB"), requires that an unfair labor practice charge be both filed and served within six months.

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months *prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.*

Id. (emphasis added).

The Court applied the six-month statute of limitations found in Section 10(b) of the NLRA to hybrid actions because of the similarity of such actions to unfair labor practice charges and because of "considerations relevant to the choice of a limitations period." 462 U.S. at 170-171.

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. . . . *Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, as well as the clear congressional*

> *indication of the proper balance between the interests at stake, counsels the adoption of* § 10(b) *of the* NLRA *as the appropriate limitations period for lawsuits such as this.*

Id. at 171 (emphasis added), *quoting United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring). Thus, the Court found that adoption of the six-month limitation period best served the need for uniformity, speed, and finality in the resolution of labor disputes.

Although the Court did not expressly address the statute's six-month service requirement in *DelCostello,* the considerations that prompted adoption of the statute of limitations require both filing *and* service of the complaint within six months after the cause of action accrues. The filing and service of the complaint performs essentially the same function as the filing and service of an unfair labor practice charge in proceedings before the NLRB. The six-month time limitation promotes the prompt resolution of labor disputes, and the prompt resolution of such disputes is best accomplished by adopting both the filing requirement and the service requirement of Section 10(b). Failure to adopt the statute's unambiguous service requirement would delay the initiation of the dispute resolution process and defeat the objective of facilitating the speedy and final resolution of labor disputes. Indeed, because the Federal Rules of Civil Procedure ordinarily allow an additional 120 days after filing of the complaint to complete service, the time for serving the complaint would be increased from six to ten months. *See* Fed. R. Civ. P. 4(j).

In light of the fact that Congress expressly provided a statutory service requirement for closely analogous claims, "the intent, spirit, and plain language of § 10(b) require that a complaint [in a hybrid action such as this] be both filed and served within the six-month limitation period." *Simon v. Kroger Co.,* 743 F.2d at 1546.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

OF COUNSEL:

LOUIS P. MALONE, III
GENERAL COUNSEL
Brotherhood of Maintenance of Way Employes
Room 801
400 First Street, N.W.
Washington, D.C. 20001

William J. Birney
(Counsel of Record)

WILLIAM G. MAHONEY
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Brotherhood of Maintenance of Way Employes, Local 2906 and Anthony Vincent

Date: June 2, 1986

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served pies of the Brief Of Respondents Brotherhood Of Maintenance Of Employes, Local 2906 And Anthony Vincent In Opposition To the tition by first-class mail, postage prepaid and properly dressed to the following:

Paul Alan Levy
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Lucy S.L. Amerman
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, Pennsylvania 19103

Robert B. Stoloff
Deputy Attorney General
McCarter Highway and Market Street
P.O. Box 10009
Newark, New Jersey 07101

Dated at Washington, D.C. this 2nd day of June, 1986.

William J. Birney

HIGHSAW & MAHONEY, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Brotherhood of Maintenance of Way Employes, Local 2906 and Anthony Vincent

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR PETITIONER

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 15, 1986

QUESTION PRESENTED*

Are actions involving the federal duty of fair representation sufficiently unique to warrant creating an exception to the general rule that in federal question cases the filing of a complaint, not completion of service, satisfies the statute of limitations?

* All parties to the proceeding in the courts below are identified in the caption.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

As a general rule, the statute of limitations in a federal question case is satisfied by filing a complaint with the clerk of the district court within the relevant time period. The court below created an exception to this rule for complaints involving the duty of fair representation, on the theory that this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), required that such complaints be served on the defendants, as well as filed in court, within the six-month limitations period. Because the adoption of the rule requiring service within six months would undermine a vital "bulwark to prevent arbitrary union conduct," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), the decision below should be reversed.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 14a to 17a of the appendix to the petition for a writ of certiorari. ("Pet. App. 14a-17a"). The court of appeals' opinion is reported at 780 F.2d 361 and is reprinted at Pet. App. 1a-13a.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. App. 18a. On March 27, 1986, Justice Brennan extended the time for filing a petition for a writ of certiorari until May 5, 1986. The Court granted certiorari on June 30, 1986. 106 S. Ct. 3293. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure provides:

> A civil action is commenced by filing a complaint with the court.

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides as follows, with the most relevant portions italicized:

> (b) *Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board*, or any agent or agency designated by the Board for such purposes, *shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect*, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made*, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

STATEMENT

Petitioner Thomas West was employed in New Jersey as a mechanic by respondent Consolidated Rail Corporation ("Conrail"), and was represented in collective bargaining by respondent Local 2906 of the Brotherhood of Maintenance of Way Employees ("Union"). In November, 1981, as petitioner was leaving a company truck in which he had been riding in the back seat, four bottles of beer were found on the front seat. Petitioner was fired despite his spotless record and his assertion that he was unaware that there had been any beer in the truck.

Over the next 28 months, petitioner was repeatedly assured by respondent Anthony Vincent, his Union representative, that although the appeal of his termination had been delayed, it was being pursued, and that the Union would obtain both reinstatement and back pay for him. During this time, petitioner accepted an offer of reinstatement from Conrail, but the backpay issue remained unresolved. On March 25, 1984, petitioner first became aware that his Union representative was not pursuing the question of backpay, and that there was little, if any, chance that any further action would be taken.

On September 24, 1984, petitioner filed a complaint in the United States District Court for the District of New Jersey alleging that respondent Conrail had discharged him in violation of the collective bargaining agreement, and that respondents Union and Vincent had breached their duty of fair representation by their failure to pursue his grievance. Respondent New Jersey Transit was sued as the successor in interest to Conrail. The summonses and complaints were mailed to respondents on October 10, 1984, pursuant to Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure, and respondents acknowledged service on dates ranging from October 12, 1984, through November 1, 1984. For present purposes, it is undisputed that the complaint was filed before the statute of limitations had expired, but that service was not completed until after the statute had run. Pet. App. 3a, 17a.

Relying on this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), respondents moved for summary judgment on the ground that the action was barred by the six-month statute of limitations, borrowed by this Court from section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Respondents argued, and the district court agreed, that because section 10(b) requires unfair labor practice charges to be both served on the respondents and filed with the National Labor Relations Board within six months, a "hybrid action" such as this, brought both to enforce the union's duty of fair representation and the employer's obligation under the contract, must also be served on all defendants, as well as filed with the district court, within that limitation period. App. 17a.

A divided panel of the Court of Appeals for the Third Circuit affirmed. The majority, consisting of Judges Stapleton and Adams, acknowledged that the general rule for federal question lawsuits is that the action is commenced, and the statute of limitations tolled, by filing the complaint. Pet. App. 4a. They observed, however, that at the time of their decision most courts that had addressed the question in fair representation cases had nonetheless required service as well as filing within six months. *Id.* at 4a-5a. It concluded that this Court's decision in *DelCostello* was based on a balance of interests struck by Congress in section 10(b), and that balance required both filing and service within six months. *Id.* at 5a-6a.

Judge Gibbons dissented. In his view, neither the district court, nor any of the decisions on which the majority relied, had analyzed the question, but had merely assumed that this Court intended in *DelCostello* to require adoption of all of section 10(b), not just its limitations period. Pet. App. 9a. He declined to follow that approach for several reasons. First, he noted that section 10(b) only requires service of a simple "charge" filed by the injured party within six months, although a substantial amount of time may pass before the respondent learns that the agency has decided that there is reason to believe that the statute was violated and thus to file a "complaint" against the respondent. *Id.* at 10a. Moreover, the notice functions performed under the NLRA by section 10(b)'s service requirement are met in federal court by Rules 4(a) and 4(j) of the Federal Rules of Civil Procedure, which assure prompt service. *Id.* at 10a-11a. Thus, although it was necessary to turn to section 10(b) to "borrow" a statute of limitations to fill a gap in federal law, Judge Gibbons concluded that there is no gap in federal law—and thus no need to borrow any rules—regarding the end of the running of the statutory period. *Id.* at 12a. Finally, Judge Gibbons observed that by adhering to the requirements of the Federal Rules, and not adopting the rest of section 10(b), the courts would maintain a uniform federal procedure and decrease uncertainty by establishing an easily ascertainable point to measure the ending of the limitation period. *Id.* at 11a-12a.

Because of the need to provide a uniform answer to this question, on which the circuits are now evenly divided, the Court granted certiorari. 106 S. Ct. 3293.[1]

SUMMARY OF ARGUMENT

The normal rule in federal question cases is that the statute of limitations is satisfied by filing a complaint within the required time, and service within that time is not required. The court below believed, however, that this case should be treated differently because in *DelCostello* this Court decided that duty of fair representation ("DFR") cases are governed by section 10(b) of the NLRA, and that section requires service as well as filing within six months.

The source of the court's error is three-fold—it overstates the effect of *DelCostello*, overlooks important interests recognized in *DelCostello* that would not be advanced by its rule, and understates the damage which the rule it proposes would wreak on the interests which the *DelCostello* rule was intended to serve. Thus, in DelCostello the Court did not decide that every detail of the administrative procedure set forth in section 10(b) would henceforth be applied to DFR actions in the district courts; rather, it only decided that the available state statutes of limitations would so disserve the various interests at stake in DFR cases that it was appropriate to borrow the federal limitation period adopted by Congress for filing unfair labor practice charges. Moreover, there is no need to adopt a special rule requiring prompt service of DFR complaints because the Federal Rules already provide for dismissal of actions unless service has been obtained within 120 days after filing of the complaint.

[1] The Ninth and Eleventh Circuits agree with the Third Circuit. *Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986), *cert. pending*, No. 85-1835; *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984). The Second, Sixth and Eighth Circuits disagree. *Ellenbogen v. Rider Maint. Corp.*, 794 F.2d 768 (2d Cir. 1986); *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *cert. pending*, No. 85-1400; *Thomsen v. UPS*, 792 F.2d 115 (8th Cir. 1986), *cert. pending sub nom. Local 710, International Brotherhood of Teamsters v. Thomsen*, No. 86-340. *Accord, Berthelot v. Martin Marietta Corp.*, 630 F. Supp. 929 (E.D. La. 1986).

Finally, the differences between the service of an administrative charge at the NLRB and the procedures for serving a complaint in district court are such that adoption of the service rule proposed by the union would substantially cut into the six-month period within which DFR actions must be brought. Thus, because there is no basis for carving out an exception to the general rule that limitation periods in federal question cases are satisfied by filing the complaint, the decision below should be reversed.

ARGUMENT

THE *DELCOSTELLO* DECISION DOES NOT WARRANT A DEPARTURE FROM THE NORMAL FEDERAL RULE THAT THE STATUTE OF LIMITATIONS IS SATISFIED BY FILING A COMPLAINT IN THE DISTRICT COURT.

A. The Normal Federal Rule.

As the court below recognized, Pet. App. 4a, and as at least some of the respondents conceded, if this were a suit under any other federal statute, there would have been no question that the statute of limitations was satisfied by filing the complaint in district court, notwithstanding petitioner's failure to complete service on all four defendants for several weeks following expiration of the limitations period. Thus, outside the fair representation area, every court of appeals which has considered the question has decided that Rule 3 of the Federal Rules, under which "[a] civil action is commenced by filing a complaint with the court," determines what steps are necessary to satisfy the statute of limitations when litigating a federal claim in federal court, absent an express federal statute providing otherwise. *Bomar v. Keyes*, 162 F.2d 136, 140-141 (2d Cir. 1947); *Moore Co. v. Sid Richardson Carb. & Gas Co.*, 347 F.2d 921, 924 (8th Cir. 1965); *United States v. Wahl*, 583 F.2d 285, 287-288 (6th Cir. 1978); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184,

1188 (5th Cir. 1980); *Jordan v. United States*, 694 F.2d 833, 837 n.7 (D.C. Cir. 1982); *Metropolitan Paving Co. v. Operating Engineers*, 439 F.2d 300, 306 (10th Cir. 1971). *See also* 2 *Moore's Federal Practice* ¶ 3.07[4.-3-2], at 3-113 to 3-126 (1986); 4 Wright & Miller, *Federal Practice & Procedure: Civil* § 1056, at 177-178 (1969). *Accord, Poetz v. Mix*, 7 N.J. 436, 440, 81 A.2d 741 (1951) (same rule under law of New Jersey, where case arose and was filed).

This Court has never squarely decided that Rule 3 has this significance, but its decisions strongly point in that direction. Thus, in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), the Court held that Rule 3 would not supersede a contrary state statute in a diversity case, but it distinguished the Second Circuit's decision in *Bomar v. Keyes, supra*, apparently agreeing with the Second Circuit that Rule 3 determines what is required to satisfy the statute of limitations in suits to enforce federal rights. 337 U.S. at 533. *See* Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 729 (1974). This reading of the *Ragan* dictum was confirmed in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), where the Court reaffirmed the holding of *Ragan*. In doing so, the Court observed that *Ragan* "suggested . . . that in suits to enforce rights under a federal statute Rule 3 means that filing of the complaint tolls the applicable statute of limitations," but it declined to decide the question. 446 U.S. at 751 n.11. Since *Walker* was decided, the courts have remained virtually unanimous—at least in non-DFR suits—that Rule 3 governs that satisfaction of the statute of limitations in federal question cases.[2]

[2] *E.g., Cohn v. Board of Education*, 536 F. Supp. 486, 493-495 (S.D.N.Y. 1982); *Wells v. Portland*, 102 F.R.D. 796, 799-800 (D. Ore. 1984); *Perkin Elmer v. Trans Med. Airways*, 107 F.R.D. 55 (E.D.N.Y 1985); *Gutierrez v. Vergari*, 499 F. Supp. 1040, 1049 n.7 (S.D.N.Y. 1980); *Hobson v. Wilson*, 737 F.2d 1, 44-45 (D.C. Cir. 1984). Even the courts holding that fair representation complaints must be served as well as filed within the six-month limitations period have generally recognized that they are departing from the general rule. *E.g.*, Pet. App. 4a; *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 613 (11th Cir. 1984). An exception is *Ellenbogen v. Rider Maint. Corp.*, 621 F. Supp. 324, 326 (S.D.N.Y. 1985), *rev'd*, 794 F.2d 768 (2d Cir. 1986), although the same District Judge intimated a different view of Rule 3 elsewhere. *Buccino v. Continental Assur. Co.*, 578 F. Supp. 1518, 1523 n.3 (S.D.N.Y. 1983).

This Court took the same view of Rule 3 in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), where the question was whether a plaintiff had satisfied the ninety-day statute of limitations which is expressly provided for in Title VII cases. Without adverting to either *Walker* or *Ragan*, the Court answered that question by looking to see whether, within the ninety-day period, the plaintiff had complied with Rule 3 by filing a "complaint" with the court. 466 U.S. at 149. Because the Court concluded that the document filed within the limitations period did not constitute a complaint under the Federal Rules, the Court held that the statute of limitations had not been satisfied and that the action had to be dismissed.

The court below concluded, however, that this case is not controlled by the general rule because section 10(b) requires both filing and service in order to commence an action. In so ruling, the court did little more than cite the approach taken by several other courts which can be summarized as follows: the service requirement is contained in section 10(b) because Congress thought it necessary for unfair labor practice charges, and "[t]here is no reason why the six-month period would be borrowed and the filing and service would be left to the general rule." *Howard v. Lockheed-Georgia, supra*, 742 F.2d at 614.[3]

The short answer to this argument is that even when courts borrow state limitations periods for federal question cases, they apply the general rule that filing the complaint in federal court tolls the statute. *E.g., Jackson v. Duke*, 259 F.2d 3, 6 (5th Cir. 1958). Of course, had Congress specified that, notwithstanding the general rule set forth in Rule 3, a suit to enforce a particular right is not timely unless certain prerequisites in addition to filing are met, that would decide the issue. But section 10(b) con-

[3] Section 10(b) also permits respondents to be required to file an answer and appear at a hearing as little as five days after the unfair labor practice complaint is filed, permits the complaint to be amended not only during but even after trial, provides a standard for intervention, and requires application of the federal rules of evidence only "so far as practicable." Yet nobody has argued that *DelCostello* also requires that these provisions should displace Federal Rules 12, 15 and 24, and excuse compliance with the Federal Rules of Evidence, in DFR litigation.

tains no Congressional judgment about DFR litigation. In order to understand why the court of appeals erred in concluding that the service requirement should nonetheless be imposed on DFR plaintiffs, we first review briefly in Section B the genesis both of the DFR and of the *DelCostello* decision that was designed, not to frustrate, but to channel the resolution of DFR claims. *See generally Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986). Thereafter, in Sections C and D, we demonstrate that the ruling below produces results inconsistent with that history and would frustrate the enforcement of DFR claims.[4]

B. The History of the DFR Claim and of the Relevant Statute of Limitations.

Although nowhere expressly set forth in any labor statute, the DFR is a necessary product of the fact that a free society, which places a high value on the rights of the individual, nevertheless makes collective bargaining the central element of its national labor policy. Federal law gives a majority of employees in an appropriate bargaining unit the right not only to choose a representative for purposes of collective bargaining, but also to impose their choice on all other employees in the unit, depriving the minority of the right to bargain for themselves. NLRA § 9, 29 U.S.C. § 159. *See Emporium-Capwell Co. v. Western Add'n Cmnty. Org.*, 420 U.S. 50 (1975). This exclusive representative (the union) has the right to abrogate any bargains that might be struck by individual employees. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Moreover, once an agreement has been reached, the

[4] The fact that the service requirement is a departure from the normal federal rule places a burden of justification on its proponents. In our view, however, even if respondents do not bear the burden of justification, the balance of the policy interests at stake clearly requires that filing be deemed sufficient to satisfy the statute of limitations. Accordingly, the Court could reverse the decision below without deciding the question postponed in *Walker v. Armco Steel Corp., supra*, if it believes that the "normal federal rule" is in doubt and prefers to wait for a case in which its resolution is essential to the result.

union has the exclusive authority to decide in each case whether to use the enforcement mechanisms created by it—normally a grievance and arbitration system—to seek redress for violations of the contractual rights of individual members. *See Vaca v. Sipes*, 386 U.S. 171, 190-191 (1967).

In a free society, such authority carries with it a fiduciary responsibility to the individuals whose bargaining rights are thus extinguished. Indeed, as the Court recognized in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-199 (1944), grave constitutional questions would arise unless the union also had a duty to exercise these statutory powers in a manner fair to all employees. Although *Steele* arose under the Railway Labor Act, the Court found a similar duty to represent employees "fairly and impartially" under the NLRA. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). And, because the collective representative also controls the individual's access to the grievance system, the Court has ruled that the DFR extends to a union's exercise of its grievance handling authority as well as to the power to negotiate contracts which was involved in earlier cases. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

The Court first confronted the question of statutes of limitations for DFR cases in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). Because the question on which certiorari had been granted was narrow, the Court was restricted in *Mitchell* to deciding which state statute of limitations was most closely analogous to Mitchell's suit against his employer over a discharge that had been upheld by a joint labor-management committee. Given that choice, the Court decided that the state limitation period for seeking to vacate an arbitration award not only was the most closely analogous, but also was the most appropriate because the alternatives—tort, contract, or rights created by statute—often allowed plaintiffs to wait as long as six years before filing suit.

Then, two years later in *DelCostello*, the Court was asked to choose between borrowing a state limitation period and borrow-

ing a federal one. The Court began by recognizing that when federal courts are required to choose a limitation period for a particular federal right for which Congress has not prescribed a specific period, they normally borrow state statutes rather than federal ones. 462 U.S. at 158-160. However, the Court also recognized that state limitation periods should not be applied when doing so would frustrate the relevant federal policies. *Id.* at 160-161. The Court decided to apply this exception to DFR actions, both because the analogy between the federal and the state claims was somewhat tenuous and, more important, because the application of the most closely analogous state limitation period posed a serious obstacle to the enforceability of the DFR, inasmuch as most states allow only ninety days to sue to vacate arbitration awards.

The Court noted that a DFR suit is brought, not by a commercial enterprise or other institution which has regular dealings with attorneys, but by an unsophisticated employee who "is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit." *Id.* at 167. Although it had decided in *Mitchell* that a state arbitration statute was preferable to allowing DFR suits to be filed six years after the violation, it did not follow that ninety days was enough time for a worker to bring a DFR action. Thus, the Court rejected state arbitral limitation periods because they "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.*

Buttressing the Court's willingness to reject the state limitation periods was the availability of a federal limitation period designed to accommodate a similar range of interests. *Id.* at 169. Thus, Congress had decided that six months was the proper amount of time for "making charges of unfair labor practices to the NLRB," 462 U.S. at 169, and the DFR not only is inferred from the NLRA, but also raises issues similar to some of the claims which are commonly advanced under sections 8(b)(1)

and 8(b)(2) of the NLRA. Accordingly, without deciding that six months was an ideal limitation period, the Court ruled that it was the most closely analogous period and should be applied to DFR suits.

The Court specifically denied that its holding was based upon Congressional intent to apply section 10(b) to hybrid cases. To the contrary, it said, the only reason that it had to look for an applicable statute of limitations was that Congress had not intended *any* particular statute of limitations to apply in such cases, and the Court had to identify "the most suitable source for borrowing *to fill a gap in federal law.*" 462 U.S. at 169 n.21 (emphasis added). Accordingly, under the reasoning of *DelCostello*, respondents cannot justify turning to section 10(b) to borrow its service requirements unless they can identify "a gap in federal law" that needs to be filled. But no such borrowing is needed because Federal Rule 3 supplies the rule to govern this case. As the Second Circuit observed in *Ellenbogen v. Rider Maint. Corp.*, 794 F.2d 768, 769 (1986), "In this context Polonius' admonition: 'neither a borrower, nor a lender be,' for 'borrowing dulls the edge of husbandry' is sound advice."

In order to justify an exception to the normal rule in federal question cases, respondents must make a showing comparable to that in *DelCostello: i.e.*, that the general rule would so frustrate the policies served by the DFR and its statute of limitations that it is necessary to apply a different rule, *and* that the application of the service requirement of section 10(b) would not frustrate the relevant federal policies underlying DFR actions. The court of appeals paid no attention whatsoever to these considerations, and as we now show, the exception cannot be justified on either ground.[5]

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[5] Unlike *DelCostello*, the DFR in this case is based on the Railway Labor Act ("RLA"), not the NLRA. Although the RLA has a two-year statute of limitations for suits to overturn an arbitration decision, 45 U.S.C. § 153, First (r), every court of appeals to consider the issue has concluded that the NLRA's six-month limitations period should also be borrowed for DFR actions in industries subject to the RLA. *E.g., Dozier v. TWA*, 760 F.2d 849, 851 (7th Cir. 1985). This action was litigated in the lower courts on that assumption, and we do not argue in this Court that the six-month limitation period does not apply to this case.

C. Application of the General Rule That Filing the Complaint Satisfies the Statute of Limitations Would Not Frustrate the Policies Underlying Either the DFR Doctrine or the *DelCostello* Decision.

One key reason given by the *DelCostello* Court for choosing the six-month limitation period was to stabilize labor relations by allowing the parties to a collective bargaining agreement to be certain after a modest amount of time that the dispute is over. 462 U.S. at 168-169. Some unions have argued that, under Rule 3, the parties will be put in limbo for substantial periods beyond six months, or may not realize that they must face litigation until after records have been destroyed and witnesses have either departed the scene or forgotten the events in question. As we now explain, this argument is vastly overstated.

Although there once may have been some danger of such lingering uncertainties, when an action could survive even if service were not achieved for as long as three years, *Moore Co. v. Sid Richardson Carb. & Gas. Co.*, 347 F.2d 921 (8th Cir. 1965), that possibility was removed by the 1983 amendments to the Federal Rules of Civil Procedure. Under Rule 4(j), absent a showing of good cause, a complaint must be dismissed unless service has been obtained within 120 days. Thus, although a union or employer may be sued without having received notice within the six month period, it can be sure of having received such notice shortly thereafter. Moreover, if a union or employer wished to discard records pertaining to a particular grievance, it could call the district court immediately after the six months has run to learn whether a complaint has been filed against it. Finally, even if a plaintiff sought an extension of time to complete service, the courts would consider the policies behind the six-month limitation period, including whether defendants had any notice of the suit and were prejudiced by the delay, as well as whether the plaintiff had diligently sought to effect service. Accordingly, the policies advanced by section 10(b)'s requirement that service be made within six months are substantially satisfied in federal court litigation by the prompt service requirement of Rule 4(j). Therefore, it is unnecessary to borrow the service rule in section 10(b) to replace the general rule in order to ensure the expeditious resolution of labor disputes.

Indeed, this case nicely illustrates the hollowness of the claim that Rule 3 spreads a cloud of uncertainty over the affairs of employers and unions alike. The complaint was filed on September 24, 1984, the summonses and complaints were mailed on October 10, 1984, and respondents acknowledged service on dates between October 12 through November 1. In contrast to these respondents who received notice of this action in less than a month after it was filed, petitioner's grievance was allowed to lie fallow for over 28 months before he found out that it was being abandoned. If speedy resolution of labor disputes is what unions and employers want, they have it fully in their power to provide a prompt decision, which will start the six-month period running. Moreover, the employee, who is generally both out of a job and low on funds, has no interest in delay inasmuch as he or she can only obtain relief after defendants are served and the lawsuit is won.

Furthermore, even section 10(b) does not require that the union and company receive notice of the employee's allegations within the six month period because, under NLRB regulations, service is effective upon mailing of the unfair labor practice charge. 29 C.F.R. § 102.113(a).[6] This regulation has been specifically upheld as a proper construction of section 10(b) because it avoids the uncertainties that would otherwise be produced by the "vicissitudes and uncertainties" of requiring actual receipt within six months. *NLRB v. Laborers Local 264*, 529 F.2d 778, 781-785 (8th Cir. 1976). Indeed, as the dissenting judge below noted, even after the charge has been received, the person named in the charge still does not know whether the Board's General Counsel will actually initiate proceedings against it, and there is no time limit within which the General Counsel must decide whether or not to do so. Pet. App. 10a. Ob-

[6] The Board's regulations on service, 29 C.F.R. §§ 102.14 and 102.111-.113, and the standard NLRB charge form, are included in the addendum to this brief at 1a-4a.

viously, if the NLRB may adjudicate unfair labor practice charges despite the fact that the respondent has not received actual notice that proceedings will be initiated against it until long after six months have passed, there is no reason why the power of district courts to hear DFR claims should be more limited.

Thus, it is clear that application of the general rule that the statute of limitations is satisfied by filing the complaint would not frustrate the policies underlying *DelCostello* or section 10(b). However, application of the rule for which respondents argue would frustrate those policies in a variety of ways, as we now demonstrate.

D. A Requirement That Service of a DFR Complaint Be Effected Within Six Months Would Frustrate the Policies Underlying *DelCostello* and Would Endanger the Enforcement of the DFR.

An unspoken assumption underlying the ruling below is that service of a complaint in federal court is a simple matter and that requiring it to be completed within six months will not cut substantially into the period provided in section 10(b). Aside from the fact that many DFR complaints are filed *pro se, e.g., Ellenbogen v. Rider Maint. Corp.*, 794 F.2d 768, 772 (2d Cir. 1986); *Thomsen v. UPS*, 792 F.2d 115, 116 n.2 (8th Cir. 1986), initiating litigation and obtaining service in these cases is by no means a routine exercise that can be quickly and certainly accomplished, even by an experienced practitioner. The fundamental flaw in the decision of the court below is that it attempts to engraft a service rule designed by Congress for the use of individual workers to initiate an administrative investigation of alleged wrongdoing onto federal court proceedings which make far greater demands on workers and their lawyers in order to initiate litigation.

As this Court recognized in *DelCostello*, once the employee's grievance is finally denied, the prospective DFR plaintiff, who normally has little legal sophistication and no contact with lawyers, must decide that his or her legal rights have been violated, find a lawyer and produce enough money to finance

litigation, and prepare and initiate a lawsuit. 462 U.S. at 165-166. Moreover, although most defense counsel in DFR litigation are highly experienced labor lawyers, such lawyers are usually unwilling to represent DFR plaintiffs, and the lawyers who are willing to take DFR cases often have little or no prior knowledge of what is required in a DFR suit. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buff. L. Rev. 89, 143-144 and n.198 (1985).

Initially, the plaintiff's attorney must conduct a reasonable inquiry into the merits, Rule 11, F. R. Civ. P., and then prepare a complaint which, although it need only be a "short and plain statement of the claim," Rule 8, F. R. Civ. P., must nevertheless contain specific averments of various kinds. The Board, by contrast, provides a simple, one-page, preprinted form that provides space for including information about the charging party and the accused, and elicits a simple statement, usually a single sentence or brief paragraph, describing the alleged violation. *See* Addendum, 4a. The specifics are then ascertained by the General Counsel's investigation, which culminates in a complaint that provides sufficient detail about the unfair labor practice to permit the respondent to prepare a defense if, in fact, the General Counsel believes that a violation was committed. As the Court said in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit." [7]

Once the complaint has been drafted, the plaintiff must then prepare summonses, have the district court clerk emboss them with the court's seal, and decide how to serve them. The proper means of service depends on the type of defendant to be served, Rule 4(d), as well as whether the defendant is located in the

[7] However, in order to be faithful to the principle advanced by the court below, so that the balance struck by Congress in section 10(b) would determine everything that a DFR plaintiff must do within the six-month limitations period, the courts would be required to disregard Rule 8 of the Federal Rules of Civil Procedure and hold that service of an administrative form is sufficient to initiate a DFR suit. *But see Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984).

forum state or elsewhere. Rule 4(e). And, if the defendant is located outside the forum state, the plaintiff must decide which state service rules are applicable. In some circumstances, the plaintiff may be able to use the special acknowledgement form provided by Rule 4(c), although in many circumstances that kind of service may not be effective. Although assistant clerks of many courts are helpful in this regard, particularly for a plaintiff proceeding *pro se*, they will not necessarily be able to provide the correct answer in every situation and almost certainly will not be sufficiently familiar with the special requirement under section 10(b) to warn the plaintiff that service must be completed within the six-month statute of limitations period, rather than within 120 days after filing as provided in Rule 4(j).

Assuming that the plaintiff has mastered the different service procedures in the judicial forum, he or she must then proceed to use the correct method or methods. But, under the decision of the court below, he or she also must be sure to file the complaint well before the expiration of the six-month limitation period, because service of a complaint pursuant to Rule 4 is effective only upon receipt by the defendant.[8] Thus, if the plaintiff has chosen an incorrect means of service for the particular defendant, or if the process server errs or is delayed, then service has not been completed. And, more important, if the statute of limitations has expired in the interim, then according to the theory accepted by the court below, the complaint must be dismissed as untimely. *E.g., Hoffman v. United Markets*, 117 LRRM 3229, 3231 (N.D. Cal. 1984); *Sieg v. Karnes*, 693 F.2d 803 (8th Cir. 1982).

In these circumstances, adoption of a rule requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed. *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166, 1171 (6th Cir. 1985). *See also Simon v. Kroger Co.*, 105 S. Ct.

[8] Although Rule 5(b) provides that service of most documents is effective upon mailing, Rule 5 does not apply to service of the summons and complaint. 4 Wright & Miller, *Federal Practice & Procedure: Civil* § 1141, at 569 (1969).

2155, 2156 (1985) (three Justices dissenting from denial of certiorari). Thus, a plaintiff who files a complaint against in-state defendants two or three weeks before the expiration of the statute of limitations may be too late in many cases, given the vagaries of completing service. And where a defendant is located in another state, or on the other side of the country (which is not infrequent where an international union is a DFR defendant), it would be necessary to file more than a month in advance to avoid the expiration of the six-month period.

Furthermore, defendants in DFR cases would have every incentive to refuse or evade service, or to quibble over the propriety of the form of service, despite having received actual notice of the proceeding, inasmuch as they might be able to defeat the action altogether, instead of simply delaying its prosecution, if they could only avoid having received the proper papers, in the proper manner, by the proper agent, in the proper time. *See Thomsen v. UPS*, 792 F.2d 115, 116 n.2 (8th Cir. 1986). Requiring service within six months would thus have the effect of encouraging litigants to battle over service issues, despite the plain intention of the Federal Rules to discourage such quarreling. In this regard, we note that because unions are unincorporated associations and generally do not have registered agents for the receipt of process, the plaintiff must track down the appropriate union officer, with the statute of limitations hanging in the balance, and attempt to serve him or her properly.

Moreover, even the simplified service procedures of Rule 4(c)(2)(C)(ii) would be virtually useless in DFR cases unless the complaint were filed several weeks before the limitations period expired. Thus, the defendant who receives the acknowledgement form has twenty days to send a reply. If expiration of the statute of limitations were imminent, the defendant would have every reason to ignore the notice and acknowledgement, in the hope that the plaintiff would not succeed in securing both reissuance of the summons and proper service within the required time. *See Sieg v. Karnes, supra. But see Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984) (state statute of limitations satisfied by unacknowledged receipt of process).

However, as the Court expressly recognized in *DelCostello*, 462 U.S. at 166, a limitation period that gave employees significantly less time than six months to initiate their DFR claims would likely prevent many such employees from invoking the protection of the DFR, which is a "bulwark to prevent arbitrary union conduct." *Vaca v. Sipes, supra*, 386 U.S. at 182. Thus, the very considerations that led this Court in *DelCostello* to adopt the limitations period in section 10(b), instead of a shorter state limitation period, lead to the conclusion that borrowing the service requirement in section 10(b) would seriously harm the policies underlying both *DelCostello* and the DFR in a way that borrowing the six-month limitation period would not.

Borrowing the service requirement could also have the effect of making the suit against the union untimely, while the suit could proceed against the employer, or *vice versa*. The reason for this difference is that, especially where different methods of service are used for each defendant, or where the defendants are located in different parts of the country, service will be effected on different defendants on different days. Thus, although the complaint against all defendants may have been filed in a timely fashion, some defendants may be served within the limitation period and some after it has expired. For example, in *Thomsen v. UPS, supra*, the company was served within the six-month period, but the union was served after it expired; hence the union is the only petitioner in this Court. *Teamsters Local 710 v. Thomsen*, No. 86-340. Yet in *DelCostello* the Court chose to apply section 10(b)'s limitation period for the very reason that applying state laws could lead to different limitations periods for the employer and union halves of the hybrid DFR action. 462 U.S. at 168 n.17, 169 n.19. Applying section 10(b)'s service rule would thus have the very effect which adoption of its limitation period was designed to avoid.

These harmful effects on the policies underlying *DelCostello* and the DFR might be reduced if, in addition to borrowing the Board's requirement of service within six months, the courts also borrowed the Board's service procedures. For example, in order to initiate a proceeding before the NLRB, the requirement

in section 10(b) that the charge be served within six months is satisfied simply by sending it by certified mail to the respondent, and service is complete upon mailing. *NLRB v. Laborers Local 264, supra*. Moreover, the statute does not require that service be accomplished by the charging party, and the Board's regulations direct the Board's Regional Director, with whom the charge is filed, to serve the charge on the person against whom it is made. 29 C.F.R. § 102.14. Thus, although the regulation provides that the charging party is "responsible" for effectuating service, as a practical matter it is normally the Regional Director who handles this. The regulations also allow the party himself to serve the charge by registered or certified mail, 29 C.F.R. § 102.112, or to have any other person accomplish service by personal delivery, registered or certified mail or telegraph, or by leaving a copy at the respondent's principal office or place of business. 29 C.F.R. § 102.111(a). The court of appeals did not suggest that service in this fashion would have made the complaint timely here, but the logic of its ruling—that the federal courts should attempt to replicate the balance of interests in section 10(b)—surely suggests that conclusion.

But adopting NLRB service procedures for hybrid actions would have its own very substantial disadvantages. First, it would require the district courts, which almost never decide NLRA cases, to construe Board regulations and decide issues of Board law in order to determine the adequacy of service. In addition, it would introduce new types of federal court service procedures for DFR cases only, contrary to the provisions of Rule 4, and thus would eliminate the advantages of uniformity in federal civil practice which was one of the principal objectives in adopting the Federal Rules of Civil Procedure. And finally, although the Board now requires certified mail, it might conclude at some future date that first-class mail would be adequate notice, *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and the courts would then be required to accept such service also.

Moreover, if the union's argument for applying the service provisions of section 10(b) were correct, presumably it would also be necessary for the federal courts to borrow the Board's other rules for applying the six-month statute of limitations, such as when a claim accrues and the statute starts to run, or when a new claim relates back to the claims specified in the original charge, thus giving the district courts yet another task of construing and applying Board law. Moreover, Board law on the relation-back question has developed in a significantly different direction than the law in the federal courts. For example, even though a charge may have been filed about the unlawful treatment of only one employee, the Board will allow prosecution of an unfair labor practice complaint about similar treatment of other employees at about the same time, although a charge about them was not filed within the six-month limitations period. *E.g., Radio Officers Union v. NLRB*, 347 U.S. 17, 34 n.30 (1954), *enf'g Gaynor News Co.*, 93 NLRB 299, 307-309 (1951) (charge by one employee properly amended to allege same violation against all other non-union employees); *NLRB v. Braswell Motor Freight Lines.* 486 F.2d 743 (7th Cir. 1973); *Algreco Sportswear Co.*, 271 NLRB 499, 514-515 (1984). The reason for this rule is that the purpose of the charge is simply to initiate the Board's investigation, "not to give notice to the respondent of the exact nature of the charges against him." *Texas Industries v. NLRB,* 336 F.2d 128, 132 (5th Cir. 1964); *Pankratz Forest Industries,* 269 NLRB 33, 37 (1984). This approach is, of course, completely inconsistent with Rule 15(c), which allows an amended complaint to relate back only if the defendant had notice of the claims of the new party. *See* 6 Wright & Miller, *Federal Practice & Procedure: Civil* § 1501, at 523-524 (1971) (standards of Rule 15(c) apply to added plaintiffs as well as added defendants); *American Pipe & Constr. Co.*, 414 U.S. 538 (1974) (assumes that unless suit was brought as class action, statute of limitations would run on claims of persons similarly situated); *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986).

The federal courts and the Board have also developed different rules for accrual and tolling of the statute of limitations.

For example, the federal courts hold that the running of the statute of limitations in DFR cases is tolled while an employee is exhausting administrative remedies under the contract or the union constitution. *Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986). By contrast, the Board, which does not recognize exhaustion defenses to unfair labor practice charges, disregards the fact that an employee may be exhausting administrative remedies in deciding statute of limitations questions. *Postal Service*, 271 NLRB 397, 400 (1984).

For all of these reasons, it is one thing to borrow a Congressionally created six-month period, but it is quite another to allow a federal administrative agency to dictate the method by which service is to be completed in federal court DFR actions, not to speak of overriding the provisions of Federal Rules 4, 8 and 15(c). Perhaps the borrowing of Board rules would be bearable if there were no other alternative, but that is plainly not the case here, because Rule 3 provides a ready, workable means of determining when the statute of limitations is satisfied. In short, it would be highly undesirable to plunge the district courts into the details of NLRB practice by adopting section 10(b) lock, stock and barrel, including its service requirements and procedures, solely in order to avoid the problems created by adopting section 10(b)'s requirement of service within six months. The best solution, we submit, is to hold that the statute of limitations is satisfied by the filing of the complaint, just as it is in all other federal question cases.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

September 15, 1986

REGULATIONS INVOLVED (29 C.F.R.)

§ 102.14 Service of Charge.

Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The regional director will, as a matter of course, cause a copy of such charge to be served upon the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.

§ 102.111 Service of process and papers; proof of service.

(a) Charges, complaints and accompanying notices of hearing, final orders, administrative law judges' decisions, and subpenas of the Board, its member, agent, or agency, may be served personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefore when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same.

(b) Whenever these rules require or permit the service of pleadings or other papers upon a party, a copy shall also be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party shall satisfy this requirement.

(c) Process and papers of the Board, other than those specifically named in paragraph (a) of this section, may be forwarded by certified mail. The return post office receipt therefore shall be proof of service of the same.

§ 102.112 Same; by parties; proof of service.

Service of papers by a party on other parties shall be made by registered mail, or by certified mail, or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. Except for charges, petitions, exceptions, briefs, and other papers for which a time for both filing and response has been otherwise established, service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner; however, when filing with the Board is accomplished by personal service the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail or telegraph.

When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made in any manner provided by the law of a State, proof of service shall be made in accordance with such law. Failure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either (a) a rejection of the document or (b) withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

§ 102.113 Date of service; filing of proof of service.

(a) The date of service shall be the day when the matter served is deposited in the United States mail or is delivered in person, as the case may be. In computing the time from such date, the provisions of § 102.114 apply.

(b) The person or party serving the papers or process on other parties in conformance with § 102.111 and § 102.112 shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner

of service. Proof of service as defined in § 102.112 shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.

Date Filed

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.

d. Address (Street, city, State and ZIP code)

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) _____ (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

3. Name of Employer	4. Phone No.
5. Location of Plant Involved (Street, city, State and ZIP code)	6. Employer Representative to Contact

7. Type of Establishment (Factory, mine, wholesaler, etc.)	8. Identify Principal Product or Service	9. No. of Workers Employed

10. Full Name of Party Filing Charge

11. Address of Party Filing Charge (Street, city, State and ZIP code)	12. Telephone No.

13. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ (Signature of representative or person making charge) _____ (Title or office, if any)

Address _____ _____ (Telephone number) _____ (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

No. 85-1804

In The
Supreme Court of the United States
October Term, 1985

THOMAS WEST,
Petitioner,

v.

CONRAIL, a foreign corporation;
BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES: LOCAL 2906, a foreign corporation;
NEW JERSEY TRANSIT, a corporation of
the State of New Jersey;
and ANTHONY VINCENT,
Respondents.

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY TRANSIT CORPORATION

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent,
New Jersey Transit Corporation
McCarter Highway & Market Street
P.O. Box 10009
Newark, New Jersey 07101
(201) 648-3710

JAMES J. CIANCIA,
Assistant Attorney General
Counsel Of Record

JEFFREY BURSTEIN,
Deputy Attorney General
Of Counsel
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals for the Third Circuit correctly affirm the District Court's dismissal of Petitioner's hybrid breach of contract/breach of duty of fair representation action based upon Petitioner's failure to satisfy the requirements of the applicable statute of limitations, 29 *U.S.C.* § 160(b)?

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No. 85-1804

In The
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v.

CONRAIL, a foreign corporation;
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES: LOCAL 2906, a foreign corporation;
NEW JERSEY TRANSIT, a corporation of the State of New Jersey;
and ANTHONY VINCENT,
Respondents.

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY TRANSIT CORPORATION

COUNTER-STATEMENT OF THE CASE

The pertinent facts with respect to the issue before this Court were never in dispute. Petitioner Thomas West was employed by Respondent Consolidated Rail Corporation ("Conrail") as a mechanic from February 9, 1981, until his discharge on November 27, 1981 (A.16).* Conrail

*"A." refers to the Appendix attached to the Petition for a Writ of Certiorari. Because the relatively few material facts in this case are undisputed and are contained in the decisions of the Third Circuit and District Court below, this Court granted Petitioner's motion to waive the filing of an appendix.

discharged Petitioner for possession of alcoholic beverages while riding in a company truck. On February 9, 1984, Conrail reinstated Petitioner by reducing his discharge to a suspension without back pay (A.16). He subsequently transferred to and has since been working for Respondent New Jersey Transit Corporation, created by the New Jersey Legislature to provide public transit service. *N.J.S.A.* 27:25-1 *et seq.*

On September 24, 1984, Petitioner filed a complaint in the United States District Court for the District of New Jersey alleging that Conrail breached the collective bargaining agreement and that his union, Respondent Brotherhood of Maintenance of Way Employees, Local No. 2906, breached its duty of fair representation in not processing his grievance against Conrail (A.3). Respondent New Jersey Transit Corporation was joined in the complaint based on an allegation that it was the successor to Conrail. The complaint was not mailed to the various defendants until October 11, 1984, and receipt of the summons was acknowledged by the various defendants between October 12, 1984 and October 22, 1984. Petitioner conceded, and all parties agreed for purposes of the action below, that the latest date on which Petitioner learned of the alleged breach of the duty of fair representation was on March 25, 1984 (A.3, 17).

In *DelCostello v. Teamsters*, 462 *U.S.* 151 (1983), this Court determined that the limitations period applicable to a "hybrid action" involving an alleged breach of contract by an employer and a breach of the duty of fair representation by a union is that contained in Section 10(b) of the National Labor Relations Act, 29 *U.S.C.* § 160(b) ("Section 10(b)"), which requires filing and service of a complaint within six months of accrual of the cause of action. Because service was not effected by Petitioner within six months of accrual, all Respondents moved for summary judgment on the ground that Petitioner failed to comply with the applicable statute of limitations.*

The District Court granted Respondent's motion for summary judgment because Respondents were not served within six months as required by Section 10(b) (A.14-17). The Court of Appeals for the Third Circuit affirmed, ruling that the borrowed limitations statute, Section 10(b), plainly requires both filing and service of process within six months of accrual of the claim. *West v. Conrail*, 780 *F.*2d 361, 363 (3rd Cir. 1985); (A.3, 6). The court below rejected Petitioner's argument that the service requirement of Section 10(b) should be ignored and instead be replaced by the service provisions of the Federal Rules of Civil Procedure, which Petitioner contended would toll the running of the applicable statute of limitations at the time of the filing of the complaint. The Third Circuit noted that the Section 10(b) filing and service requirements constituted a balance by Congress of the need for prompt resolution of labor disputes with the goal of assuring adequate representation of employees, the same interests at stake

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*While labor relations between Petitioner, his union and employer are governed by the Railway Labor Act, 45 *U.S.C.* § 151, *et seq.*, not the National Labor Relations Act ("NLRA"), the Third Circuit in *Sisco v. Conrail*, 732 *F.*2d 1188 (3rd Cir. 1984), ruled that the Section 10(b) limitation period adopted by this Court in *DelCostello v. Teamsters* also applies to fair representation claims arising under the Railway Labor Act. Petitioner does not dispute that the six month limitation period applies to this case (Pb13).

in a "hybrid" breach of contract/breach of the duty of fair representation action. 780 *F.*2d at 363-364: (A.6). The court below found that "grafting Fed. Rule Civ. Proc. 4(j) onto 10 (b) . . . would increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition," contrary to the Congressional policy favoring prompt resolution of labor disputes. *Id.*

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SUMMARY OF ARGUMENT

Under *DelCostello v. Teamsters*, 462 *U.S.* 151 (1983), the statute of limitations for a "hybrid" breach of contract/breach of duty of fair representation action is Section 10(b) of the NLRA, which unambiguously requires both filing and service within six months of accrual of the cause of action. The same considerations mandating strict adherence to the Section 10(b) filing and service requirements in unfair labor practice cases, the national interest in prompt resolution of labor disputes, warrants adherence to the adopted statute's filing and service requirements in the context of a fair representation action. The decision below is consonant with well established principles concerning application of borrowed statutes of limitation. Where service is an integral part of a borrowed statute of limitations, the borrowing includes both the statute's filing and service requirements.

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ARGUMENT

POINT I

THE DECISION BELOW IS A LOGICAL EXTENSION OF DELCOSTELLO, AND IS IN COMFORMITY WITH THE CONGRESSIONAL POLICY FAVORING RAPID RESCLUTION OF LABOR DISPUTES.

In *DelCostello v. Teamsters, supra*, this Court ruled that the applicable limitation period for purposes of a hybrid breach of contract/breach of duty of fair representation action against an employer and a union is governed by Section 10(b) of the National Labor Relations Act, 29 *U.S.C.* § 160(b), which provides in pertinent part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board *and the service of a copy thereof upon the person against whom such charge is made*. . . . [Emphasis supplied].

Congress unambiguously required both filing and service of a charge within the prescribed six month period. *Gallon v. Levin Metals Corporation*, 779 *F.*2d 1439, 1441 (9th Cir. 1986), cert. pending, No. 85-1835; *NLRB v. Local 264, Laborers International Union*, 529 *F.*2d 778, 782 (8th Cir. 1982). Based on this plain language of the applicable statute of limitations, the majority of courts addressing the issue have applied the Section 10(b) service requirement to hybrid fair representation actions, in accordance with the decision below. *Gallon v. Levin Metals Corporation, supra; Williams v. Greyhound Lines, Inc.*, 756 *F.*2d 818 (11th Cir. 1985); *Dunlap v. Lockheed Georgia Co.*, 755 *F.*2d 1543 (11th Cir. 1985); *Simon v. Kroger*, 743 *F.*2d 1544 (11th Cir. 1984), *cert. denied, — U.S.* —, 105 *S.Ct.* 2155,

85 *L.Ed.*2d 511 (1985); *Howard v. Lockheed Georgia Co.*, 742 *F.*2d 612 (11th Cir. 1984); *Waldron v. Motor Coils Manufacturing Co.*, 606 *F.Supp.* 658 (W.D.Pa. 1985); *Thompson v. Ralston Purina Co.*, 599 *F.Supp.* 756 (W.D. Mich. 1984); *Hoffman v. United Markets, Inc.*, 117 *L.R.R.M.* 3229 (N.D. Cal. 1984); *Dziekan v. Entenmann's, Inc.*, No. 85-C9544 (N.D. Ill., June 2, 1986); *Taylor v. Pathmark*, No. 85-4253 (E.D. Pa., Jan. 10, 1986).*

The court below rejected Petitioner's argument that Federal Rule 4(j), which allows for completion of service within 120 days of filing a complaint, should be grafted onto Section 10(b) for hybrid fair representation actions, enabling a plaintiff in such an action to wait up to ten months before effecting service. The court below reasoned that failure to apply both the filing and service requirements of Section 10(b) in actions of this type would be inconsistent with the purposes for borrowing this limitations statute. 780 *F.*2d at 363-364; (A.5-6). A review of the Congressional intent in enacting Section 10(b), as well as this Court's decision in *DelCostello* and in other labor cases, demonstrates the correctness of the reasoning of the court below.

This Court has found that Congress enacted the six month service and filing requirement of Section 10(b) in order:

> [T]o bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," . . . and of course to stabilize existing bargaining relationships.

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*Copies of these two unreported decisions will be forwarded if this Court wishes to review them.

Local No. 1424, International Association of Machinists v. NLRB, 362 *U.S.* 411, 419 (1960), *quoting* HR Rep. No. 245, 80th Cong., First Sess., p. 40. The statute's six month limitation period for both the service and filing of a charge is designed to prevent industrial instability "by allowing parties after the time prescribed as reasonable to assess with certainty their liability for past conduct." *NLRB v. Complas Industries, Inc.*, 714 *F.*2d 729, 732, n.1 (7th Cir. 1983), *quoting NLRB v. Auto Warehousers, Inc.*, 571 *F.*2d 860, 863 (5th Cir. 1978). Congress required service within six months "to give alleged violators the opportunity to prepare defenses and protect them against stale claims." *NLRB v. McCready & Sons, Inc.*, 482 *F.*2d 872, 875 (6th Cir. 1973).

This Court has long recognized that rapid disposition of labor disputes is a primary tenet of national labor policy, as expressed in Section 10(b). *DelCostello v. Teamsters, supra*, 462 *U.S.* at 168; *United Parcel Service v. Mitchell*, 451 *U.S.* 56, 63 (1981); *United Auto Workers v. Hoosier Cardinal Corp.*, 383 *U.S.* 696, 707 (1966). Thus, in selecting the Section 10(b) limitations period, this Court emphasized that NLRA unfair practice claims and hybrid breach of contract/breach of fair representation claims not only involve similar rights,* but also involve similar timeliness concerns. *DelCostello, supra*, 462 *U.S.* at 164, 169-71. Because of the national policy favoring expedited resolution of labor disputes, this Court rejected borrowing for

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*The interrelationship between rights under the NLRA and the duty of fair representation is underscored by the fact that "the NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices." *DelCostello, supra*, 462 *U.S.* at 170.

fair representation actions a three year state limitation period for legal malpractice, reasoning:

> [T]he grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. . . . This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later.

DelCostello, supra, 462 *U.S.* at 169, *quoting United Parcel Service v. Mitchell,* 451 *U.S.* at 63-64. Thus, the court below correctly found that the "balance struck by Congress and recognized in *DelCostello,*" reflected in the language of Section 10(b), would be upset if the service requirement was ignored. 780 *F.*2d at 363; (A.6). Just as in an unfair practice case the expression of federal labor policy in Section 10(b) mandates strict adherence to both the filing and service requirement, *NLRB v. Preston H. Haskell Co.,* 616 *F.*2d 136, 142 (5th Cir. 1980), so too in a fair representation suit, a cause of action "implied under the scheme of the National Labor Relations Act," is it appropriate to adhere to the Section 10(b) provisions. *DelCostello, supra,* 462 *U.S.* at 169. As determined by Congress, parties to labor agreements are entitled to know by the end of six months if their decisions are going to be challenged.

Petitioner contends that the aforementioned policy reasons favoring application of both the filing and service requirements of Section 10(b) to an action of this type are

"vastly overstated" (Pb14). Petitioner first contends that if a union or employer wishes to discard records concerning a grievance, "it could call the district court immediately after the six months has run to learn whether a complaint has been filed against it." (Pb14). The unfeasibility of this remarkable statement is obvious, as the court system would be greatly overburdened if employers and unions followed this suggestion in only a small fraction of the vast number of grievances and arbitrations which arise in an industrial setting. Further, this suggestion does not even address the problem of potential witnesses changing jobs in a fluid economy.

More substantively, Petitioner relies on the dissent of Judge Gibbons below in contending that under Section 10(b), even after an unfair practice charge has been received, a respondent does not know whether the NLRB will actually issue an unfair practice complaint. However, as noted by the majority of the court below in response to this assertion, "it is the filing and service of the charge that notifies the employer of the charge and initiates the dispute resolution process. . . ." 780 *F.*2d at 363; (A.6). Receipt of an unfair practice charge has the salutary effect of enabling the employer or union to maintain documents relevant to the claim.

Without any reference to the record in this case, Petitioner attempts to argue that purported difficulties in effecting service within six months "would endanger the enforcement" of the duty of fair representation (Pb15). However, a cursory examination of these supposedly serious obstacles demonstrates the hollowness of this claim. The six month limitation period on filing and serving a fair representation complaint is significantly longer than

most of the state limitation statutes applied by federal courts prior to *DelCostello,* and presents enough time even for those "unsophisticated in collective bargaining matters" to bring a claim. Contrary to Petitioner's suggestion, serving defendants in a hybrid fair representation action is not a complex matter, replete with "vagaries" (Pb19). Defendants in a fair representation action are not unknown entities, but rather consist of the union which has represented the plaintiff as bargaining agent (a union of which a typical DFR plaintiff is in all likelihood a member) and the plaintiff's employer. All that a DFR plaintiff needs to do in order to perfect service is to mail a summons, complaint and acknowledgement form to his or her union and employer after filing the complaint, pursuant to Federal Rule 4(c)(2)(C).* Indeed, in the instant matter, while Petitioner does not even attempt to explain why he waited from September 24, 1984, until October 11, 1984, to mail a summons and complaint to Respondents, service was effected by mail without any apparent difficulty (A.3, 17).

Without any reference to the record in this matter, Petitioner speculates that defendants in fair representation actions might be tempted to avoid service (Pb19). However, the undisputed facts of this case are contrary to

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*As will be argued in greater detail in Point II of this Brief, the Federal Rules of Civil Procedure concerning methods of service would still be applicable to fair representation cases under the rationale of the decision below. *Cf. Hanna v. Plumer,* 380 *U.S.* 460 (1965); *Morse v. Elmira Country Club,* 752 *F.*2d 35, 38 (2nd Cir. 1984). As also will be discussed in Point II of this Brief, Petitioner's related contention that the decision below requires adoption of the panoply of NLRB procedural requirements for unfair practice charges, even when in conflict with the Federal Rules, is unfounded.

this conjuncture, as service was acknowledged by all four Respondents in this matter within 12 days (A.3, 17). Moreover, Federal Rule 4(d)(2)(D) provides for penalties for failure of a defendant to complete and return a mailed acknowledgement of service.

Petitioner contends that adoption of the Section 10(b) service requirement would mean that procedures in the Federal Rules permitting service by mail "would be virtually useless," because defendants who receive an acknowledgement of service form have 20 days to send a reply (Pb19). However, in federal cases involving borrowed statutes of limitation where service is an integral part of the limitation period, service is effective under Federal Rule 4(c)(2)(C)(ii) when the summons and complaint are received. *Morse v. Elmira Country Club,* 752 *F.*2d 35, 38-41 (2nd Cir. 1984); *Deshmukh v. Cook,* 630 *F.Supp.* 956, 958 (S.D.N.Y. 1986). The case relied upon by Petitioner in support of his claim that the decision below would render Federal Rule 4(c)(2)(C)(ii) ineffective, *Sieg v. Karnes,* 693 *F.*2d 803 (8th Cir. 1982), has nothing to do with the ability of a fair representation plaintiff to complete service by mail. Rather, *Karnes* involved invalidation of personal service of process because it was conducted in a manner which directly violated the applicable Federal Rule of Civil Procedure.

In sum, the decision of the court below is a logical extension of this Court's holding in *DelCostello.* Allowing a plaintiff in a fair representation case to wait up to ten months after accrual of a cause of action to serve the defendant union and employer would be contrary to federal labor policy favoring rapid resolution of labor disputes, as

expressed by Congress in Section 10(b). The decision below in no sense impairs the ability of employees to enforce the duty of fair representation in federal courts.

POINT II

BECAUSE SERVICE IS AN INTEGRAL PART OF THE BORROWED STATUTE OF LIMITATIONS FOR HYBRID BREACH OF CONTRACT/BREACH OF DUTY OF FAIR REPRESENTATION ACTIONS, THE COURT BELOW PROPERLY APPLIED THE SERVICE REQUIREMENT.

Petitioner's primary argument is that the decision of the Third Circuit to apply both the Section 10(b) filing and service requirement to a hybrid fair representation action constitutes a departure from the purported normal federal rule that filing a complaint satisfies the statute of limitations (Pb7-10). This central contention of Petitioner is flawed for a variety of reasons.

First, as conceded by Petitioner, it is by no means settled that in federal question cases, the mere filing of a complaint in federal court tolls the applicable statute of limitations. As noted by this Court:

> "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." 4 C. Wright and A. Miller, *Federal Practice and Procedure* § 1057, p. 191 (1969) (footnote omitted). . . .

Walker v. Armco Steel Corp., 446 *U.S.* 740, 751, n.10 (1980). Petitioner can hardly claim that the decision below creates an exception to a "general rule" when this

Court has expressly left open the question of whether the mere filing of a complaint based on a federal cause of action tolls the applicable limitations period.

More significantly, Petitioner's contention that outside the fair representation area, Rule 3 of the Federal Rules determines when a statute of limitations is tolled for a federal claim is plainly in error. While Petitioner is correct that lower courts have generally held that filing a complaint tolls the applicable statute of limitations in a federal question case, this general rule does not apply where the applicable statute requires that an action be both filed and served within the limitations period. Not one of the cases relied upon by Petitioner for the proposition that Rule 3 of the Federal Rules governs the tolling of the limitations period involved application of a statute which required more than simple filing to commence an action (Pb7-8). In federal question cases, where the applicable federal statute poses additional requirements in order to commence an action beyond the mere filing of a complaint, such statutory provisions "are controlling and the application of Rule 3 is not involved." 4 C. Wright and A. Miller, *Federal Practice and Procedure* § 1056, p. 177 (1969). *See also* Note, "Commencement and Tolling", 66 *Cornell L. Rev.* 847, 854, n.78 (1981). Thus, in *United States v. Matles*, 356 *U.S.* 256 (1958), this Court held that where an affidavit of good cause was a statutory prerequisite to initiating an action under a federal immigration statute, the timely filing of the complaint without such an affidavit did not toll the limitations period. *See also Burrell v. LaFollette Coach Lines*, 97 *F.Supp.* 279 (E.D. Tenn. 1951) (statute of limitations not tolled by mere filing in an action brought under the Fair Labor Standards Act of 1938, 29

U.S.C. § 256, where the Act requires both filing and written consent of named plaintiffs in order to commence an action).

Moreover, in cases involving borrowed statutes of limitation, this Court has long held that where service upon an adverse party is an "integral part" of the adopted statute, the borrowing embraces both the filing and service requirements of the statute. *Walker v. Armco Steel Corp., supra; Ragan v. Merchants Transfer and Warehouse Co.,* 337 *U.S.* 530 (1949). While *Walker* and *Ragan* were diversity cases, which touch upon different considerations than federal question cases such as the instant matter, this Court has applied tolling provisions of borrowed statutes of limitations in actions arising under federal law as well. In *Board of Regents v. Tomanio,* 446 *U.S.* 468 (1980), a case based on a federal statute, 42 *U.S.C.* § 1983, this Court reaffirmed the practice not only of borrowing the most analogous state limitation period where the applicable federal statute has no particular limitation provision to govern actions under the right, but also of borrowing the tolling provisions contained in the adopted state statute. Similarly, in *Johnson v. Railway Express Agency,* 421 *U.S.* 454 (1975), an action based on 42 *U.S.C.* § 1981, this Court adopted the tolling provisions of a borrowed state statute of limitations, stating:

> Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action . . . . In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application.

Id., 421 *U.S.* at 463-464. *See also Chardon v. Fumero Soto,* 462 *U.S.* 650 (1983) (local tolling rule, as well as limitations period, borrowed in an action brought under 42 *U.S.C.* § 1983)*; *Wilson v. Garcia,* — *U.S.* —, 105 *S.Ct.* 1938, 1943, 85 *L.Ed.*2d 254, 262 (1986) (in which this Court noted that while the characterization of a federal claim for purposes of adopting a limitations provision is a question of federal law, "the length of the limitation period, and closely related questions of tolling and application" are governed by the borrowed statute).

While the situation presented in the instant matter is unusual in that it pertains to a borrowed federal, not state, statute of limitations, under the principles set forth in *Tomanio* and *Johnson,* there is no reason why a service requirement integral to the borrowed federal limitations statute should be ignored. Indeed, as the instant matter concerns a limitations period borrowed from a federal enactment which addresses rights and procedural considerations "very similar" to those involved in a fair represen-

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*Petitioner may attempt to distinguish *Tomanio, Johnson v. Railway Express Agency,* and *Chardon,* in that they all are civil rights cases to which the provisions of 42 *U.S.C.* § 1988 applied, a statute which directs federal courts to follow a three step process in determining the rules of decision applicable to claims under the Reconstruction Civil Rights Acts. However, this Court has recently noted that the provisions of 42 *U.S.C.* § 1988 are simply a Congressional codification of the long-standing practice of federal courts to borrow a time limitation if it is not inconsistent with federal policy to do so. *Wilson v. Garcia, supra,* 85 *L.Ed.*2d at 260. Moreover, while no decisions of this Court are directly on point, in federal question cases not involving claims to which 42 *U.S.C.* § 1988 applied, lower courts have borrowed not only the most analogous state limitations period, but also the state tolling provisions. *See, e.g., Blair v. Page Aircraft Maintenance, Inc.,* 467 *F.*2d 815, 819-820 (5th Cir. 1972); *Kronfeld v. First Jersey National Bank,* 638 *F.Supp* 1454, 1475 (D.N.J. 1986).

tation action, adopting the Section 10(b) service provision is especially appropriate.

Finally, Petitioner argues that the decision below should be reversed because it will "plunge the district courts into NLRB practice" in such areas as the method of service, accrual of a claim, and determination of when a new claim relates back to a claim in the original complaint (Pb20-23). This contention is plainly incorrect. First, the court below followed this Court's direction in *DelCostello* to borrow the limitations period contained in a federal *statute*. Nothing in the decision below indicates that the panoply of NLRB procedural rules must also be adopted for hybrid fair representation actions. Borrowing the Section 10(b) limitations period in no sense binds federal courts to NLRB interpretations of the statute. In fact, it is the NLRB which is required to conform its own procedures to federal court rules as much as practicable. *NLRB v. Jacob E. Decker & Sons*, 569 *F.*2d 357, 362 (5th Cir. 1979). Moreover, unlike the express service requirement of Section 10(b), the purportedly unique NLRB procedures not only are not "integral" to the Section 10(b) limitations provision, they are not even mentioned in the borrowed statute.

Secondly, in federal question cases involving borrowed statutes of limitation, it is a matter of *federal* law (not borrowed local law) as to when a cause of action accrues, *Cope v. Anderson*, 331 *U.S.* 461, 464 (1947), and as to whether amendments to a complaint relate back to the time of the filing of the original pleading. *Welch v. Louisiana Power and Light Co.*, 466 *F.*2d 1344 (5th Cir. 1972). Similarly, this Court's decision in *Hanna v. Plumer*, 380

U.S. 460 (1965) demonstrates the fallacy in Petitioner's contention that the decision below would require utilization of NLRB methods for completion of service in fair representation actions, instead of utilizing procedures contained in Federal Rule 4(c).

Just as Petitioner's lengthy argument concerning the burdens faced by a DFR plaintiff resulting from the decision below masks the simple fact that all a DFR plaintiff needs to do to initiate an action is to mail a summons and complaint after filing, so too does Petitioner's lengthy discussion concerning differences between NLRB and federal court practice obfuscate the procedural implications of the decision below. Contrary to Petitioner's suggestion (Pb23), there is simply nothing in the decision below requiring federal courts to apply NLRB procedural rules "lock, stock and barrel" which are inconsistent with federal court practice.

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CONCLUSION

For the foregoing reasons, Respondent New Jersey Transit Corporation respectfully submits that the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent,
New Jersey Transit Corporation
McCarter Highway & Market Street
P.O. Box 10009
Newark, New Jersey 07101
(201) 648-3710

JAMES J. CIANCIA,
Assistant Attorney General
Counsel Of Record

JEFFREY BURSTEIN,
Deputy Attorney General
Of Counsel
On the Brief

Dated: October 15, 1986

(1)

No. 86-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation;
BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES, LOCAL 2906, and ANTHONY VINCENT, *et al.*,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906 AND ANTHONY VINCENT

WILLIAM J. BIRNEY
(Counsel of Record)
WILLIAM G. MAHONEY
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-3500

LOUIS P. MALONE, III
400 1st Street, N.W.
Washington, D.C. 20001

Of Counsel:
DAVID SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 783-0096 - WASHINGTON, D.C. 20001

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BRIEF OF RESPONDENTS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906 AND ANTHONY VINCENT

The citations to the opinions below, the basis for invoking this Court's jurisdiction, and the statutory provisions involved in this case are set forth in petitioner's brief at pp. 2-3 and we therefore do not reprint them here.

COUNTERSTATEMENT OF THE CASE

From February 9, 1981 to November 27, 1981, petitioner Thomas West was employed by respondent Con-

solidated Rail Corporation ("Conrail") as a mechanic. West worked in a bargaining unit for which respondent Local 2906, Brotherhood of Maintenance of Way Employes ("the Union") was the exclusive representative.

On November 27, 1981, West was discharged by Conrail. The reason for the discharge was that several days earlier, four bottles of beer had been discovered in a company truck in which West had been riding.

Respondent Anthony Vincent, West's union representative, filed a grievance on West's behalf alleging that West's discharge was in breach of the collective bargaining agreement between Conrail and the Union. When that grievance was denied by Conrail at the first step of the grievance procedure, the Union appealed the grievance.

On February 1, 1984, Conrail notified the Union that it would reduce West's dismissal to a suspension for the period in which he had been out of work. West was notified of Conrail's decision by letter dated February 9, 1984, and West returned to work on February 14, 1984. West understood that "the Union was . . . successful in getting me my job back." Certification of Thomas West in Opposition to Motions For Summary Judgment, ¶ 7, January 21, 1985.

On September 24, 1984—more than seven months after returning to work—West filed the instant complaint in the United States District Court for the District of New Jersey alleging that the Union and Vincent (collectively referred to hereafter as "the Union") had breached the duty of fair representation ("DFR") in representing West, and that Conrail had violated its collective bargaining agreement with the Union by discharging him. West mailed copies of the summons and the complaint to the defendants on October 11, 1984, and the defendants acknowledged receipt on various dates from October 12 to October 22, 1984.

On November 1, 1984, the Union moved to dismiss West's complaint as barred by the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), and applicable to hybrid fair-representation/breach-of-contract litigation. West responded to that motion by claiming that his causes of action had not accrued until March 25, 1984, five months and twenty-nine days before his complaint was filed. West based this claim on a "certification" he filed in which he stated that on March 25, 1984, he had been told by a fellow employee, Michael Thornton, that he, Thornton, "was convinced that the Union and Vincent were not trying to do anything for our cases." Certification ¶ 8. The certification stated that based on this conversation West "finally realized that the Union and Vincent were simply pactifying me." *Id.* ¶ 9.

Rather than conducting discovery and litigating the question of whether West knew or should have known prior to this (alleged) March 25th conversation that West had been reinstated in February pursuant to a settlement of his grievance, the Union agreed to assume, for purposes of its motion to dismiss, that West's cause of action did not accrue until March 25, 1984. The Union contended that even on that assumption, West's complaint was untimely because West did not take any steps to serve the complaint until October 11, 1984, more than six months after the cause of action (assumedly) had accrued (and more than two weeks after West's complaint had been filed).[1]

On February 20, 1985, the district court dismissed West's complaint, holding that a fair-representation com-

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[1] Respondent Conrail, which had filed a motion for summary judgment on timeliness ground at the same that that the Union had moved to dismiss the complaint, took the same position as the Union in response to West's "certification." Both the Union and Conrail reserved the right to litigate the issue of when West's cause of action had accrued in the event that it were held that West's failure to serve the complaint within six months of March 25, 1984, did not itself render the suit untimely.

plaint must be filed and served within a six-months time period. On December 31, 1985, the United States Court of Appeals for the Third Circuit (per Stapelton, J.) affirmed the dismissal.

SUMMARY OF ARGUMENT

In *DelCostello v. Teamsters*, 462 U.S. 151, 155 (1983), this Court "conclude[d] that § 10(b) should be the applicable statute of limitations governing [a hybird duty-of-fair-representation/breach-of-contract] suit." That holding, and the reasoning on which it rests, compels the conclusion that the complaint in such a suit must be filed and served within six months after the causes of action asserted in the suit accrue.

A statute of limitations "incorporates [the legislature's] judgment on the proper balance between the policies of repose and the substantive policies of enforcement embedded in the [particular] cause of action" to which the statute applies. *Wilson v. Garcia*, —— U.S. ——, 53 L.W. 4481, 4483 (April 17, 1985). Because there is no sure calculus for fixing that balancing point, the federal courts do not invent time limits for federal causes of action not governed by an express statute of limitations; instead courts "rely[] on the [legislature's] wisdom in setting a limit . . . on the prosecution of a closely analogous claim" by "borrowing" the statute of limitations for the analogous claim. *Johnson v. Railway Express Agency*, 421 U.S. 454, 464 (1975). And because a statute of limitations "is understood fully only in the context of the various circumstances that suspend it from running," *id.* at 463, when a statute of limitation is borrowed it generally controls "questions of tolling and application," *Wilson v. Garcia, supra. See* pp. 7-8 *infra.*

Section 10(b), in terms, allows would-be-claimants six months to file and serve a charge. This statute differs from—and reflects a different value judgment than the

judgment underlying—a limitations provision that allows six months for filing and an additional period of time to effect service. The service requirement is thus an integral part of the timeliness rule established by § 10(b), and must govern the timeliness of those causes of action to which § 10(b) is applied. Pp. 8-9 *infra.*

This conclusion is confirmed by a review of the reasoning that led the Court in *DelCostello* to hold that § 10(b) governs hybrid fair-representation/breach-of-contract suits. The Court in *DelCostello* concluded that § 10(b) is "designed to accommodate a balance of interests very similar to that at stake here," 462 U.S. at 169, and thus it is especially appropriate in the present context to follow the general rule of resolving "questions of tolling and application" by reference to the borrowed law. Indeed, to do otherwise would disserve the interest in "the relatively rapid final resolution of labor disputes" and the interest in achieving "'uniformity' among procedures followed for similar claims," *DelCostello*, 462 U.S. at 168, 171—interests that underlie § 10(b) and that led the Court in *DelCostello* to borrow that statute for fair-representation cases. Pp. 9-15 *infra.*

Petitioner advances two contrary arguments, neither of which can withstand analysis.

First, petitioner contends that there is a "normal federal rule," which petitioner traces to Rule 3 of the Federal Rules of Civil Procedure, under which the filing of a complaint satisfies the statute of limitations for a federal cause of action. But Rule 3 does not so provide; it states that filing a complaint commences an action, but does not indicate whether commencement suffices to satisfy a particular statute of limitations. And the cases on which petitioner relies, while containing occasional bits of broad dictum, establish only that where the applicable statute of limitations in terms requires that an action be "brought," "initiated," "filed," "or commenced" within a specified period of time, Rule 3 controls the

determination of what steps are required to commence that action. None of the cases petitioner cites, nor any other authority of which we are aware, holds that where the statute of limitations that has been borrowed for a particular federal cause provides that filing and service must take place within a specified period, the judiciary is free to nullify the service requirement of that statute. Pp. 15-18 *infra*.

Petitioner alternatively argues that "adoption of a rule requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed." Pet. Br. at 20. But this argument simply assumes an *a priori* answer to the very question that is in dispute here. And in advancing this argument, petitioner ultimately asks this Court to decide on its own what is the appropriate period of time to allow plaintiffs in hybrid fair-representation/breach-of-contract cases to file and serve their complints, rather than to rely on the answer provided by Congress in enacting § 10(b). Pp. 18-20 *infra*.

ARGUMENT

In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), the "issue presented" was "what statute of limitations should apply" to a "suit by an employee . . . against an employer and a union alleging that the employer had breached a provision of a collective-bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings." *Id.* at 154. The Court resolved that issue by "conclud[ing] that § 10(b) [of the National Labor Relations Act, 29 U.S.C. § 160(b)]"—which in term, establishes the limitations period for filing unfair labor practice charges with the National Labor Relations Board ("NLRB" or the "Board")—"should be the applicable statute of limitations governing the suit, both against the employer and against the union." 462 U.S. at 155.

Section 10(b) in terms requires that an unfair labor practice charge both be filed with the NLRB and served on the respondent within six months. As we proceed to show, under *DelCostello*'s holding and the reasoning on which that holding rests, the courts below properly dismissed as untimely the instant suit in which service was not effected within § 10(b)'s six-month limitation period.[2]

A. A statute of limitations "incorporates the [legislature's] judgment on the proper balance between the policies of repose and the substantive policies of enforcement embedded in the [particular] cause of action" to which the statute applies. *Wilson v. Garcia*, —— U.S. ——, 53 L.W. 4481, 4483 (April 17, 1985). There is no sure calculus for making that value judgment and fixing the balancing point; thus, while "[s]tatutes of limitations . . . have long been respected as fundamental to a well-ordered judicial system" because of the "importance of the policies underlying . . . [such] statutes," *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), it is nonetheless true that "any statute of limitations is necessarily arbitrary," *Johnson v. Railway Express Agency*, 421 U.S.

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[2] *DelCostello* arose under the National Labor Relations Act and the instant case arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). But, as petitioner notes, each of the six "court of appeals to consider the issue has concluded that the NLRA's six-month limitations period should also be borrowed for DFR actions in industries subject to the RLA," and the instant case "was litigated in the lower courts on that assumption." Pet. Br. at 13 n.5. Accordingly, petitioner "do[es] not argue in this Court that the six-month limitations period does not apply to this case." *Id.*

This is not to say that hybrid fair-representation/breach-of-contract litigation under the two statutes is in all respects identical. *Compare Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) *with Vaca v. Sipes*, 386 U.S. 171 (1967); *Csozek v. O'Mara*, 397 U.S. 25 (1970) *with Bowen v. United States Postal Service*, 459 U.S. 212 (1983). *See generally Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) ("[e]ven rough analogies [between the RLA and the NLRA] must be drawn circumspectly with due regard for the many differences between the statutory schemes").

454, 463 (1975). For that very reason the federal courts have refused to engage in "the drastic sort of judicial legislation" that would be entailed in "judicially devis-[ing] . . . time limitations" for federal causes of actions not governed in terms by an express statutory limitations provision. *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 703-04 (1966). Instead the courts " 'borrow' the most suitable statute or other rule of timeliness from some other source," *DelCostello*, 462 U.S. at 158. In so doing, the courts "rely[] on the [legislature's] wisdom in setting a limit . . . on the prosecution of a closely analogous claim." *Johnson v. Railway Express, supra*, 421 U.S. at 464.

"Any period of limitations . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson v. Railway Express, supra*, 421 U.S. at 463. Accordingly, when a statute of limitations is borrowed, not only "the length of the limitations period" but also the "closely related questions of tolling and application are to be governed by [the borrowed] law." *Wilson v. Garcia, supra*, 53 L.W. at 4483.[3] These rules are all part of the "legislature's wisdom" which is to be "relied upon," *Johnson v. Railway Express, supra*, 421 U.S. at 464, in borrowing a statute of limitations.

B. Section 10(b), as we stated at the outset, provides that

> no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board *and the service of a copy thereof upon the person against whom such charge is made* . . .

This language makes it manifest that Congress decided in enacting § 10(b) to allow would-be-claimants six months to file *and serve* a charge; if the claimant fails

[3] *See also Board of Regents v. Tomanio, supra*; *Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983).

to do so, the "policies of repose," *Wilson v. Garcia, supra*, 53 L.W. at 4483, incorporated in that provision prevail.

Such a statute of limitations differs from—and reflects a different value judgment than the judgment underlying—a limitations provision that allows a claimant six months simply to file a complaint and an additional period of time to effect service. Indeed, despite petitioner's attempt to treat § 10(b) as if that provision "created [a] six-month period" and a separate "service requirement[]," Pet. Br. at 23, the fact of the matter is that § 10(b) establishes a single, unitary timeliness rule requiring that a charge be filed and served within six months of the events complained of. Thus, what the Court said in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), regarding the state statute at issue in that case is equally true of § 10(b): the "statute is a statement of a substantive decision by the legislature that actual service on . . . the defendant is an integral part of the several policies served by the statute of limitations." *Id.* at 751. Accordingly here, as in *Walker*, "the service rule must be considered part and parcel of"—indeed "an integral part of"—the "statute of limitations," *id.* at 752, and therefore must govern the timeliness of those causes of action to which § 10(b) is applied.[4]

C. The conclusion that a hybrid fair-representation/breach of contract complaint is untimely unless the complaint is filed and served within six-months of the alleged wrongful acts is confirmed by a review of the reasoning

[4] The parade of horribles that petitioner claims would flow from applying the § 10(b) service requirement in fair representation cases *assumes* that receipt of the complaint (and even proof of service) within six months will be required. *See* Pet. Br. at 18-20. It should be noted in this connection that, as the court below observed, Pet. App. 4a, the NLRB has provided by rule that service is effected upon mailing. 29 C.F.R. § 102.113(a). Because petitioner's complaint was not mailed until more than six months after his cause of action accrued, there is no occasion in this case to decide whether the NLRB's rule should be "borrowed" in the fair-representation context.

that led the Court in *DelCostello* to hold that "§ 10(b) should be the applicable statute of limitations in such suits." 462 U.S. at 155.

The *DelCostello* Court began by observing that in cases in which "there is no federal statute of limitations expressly applicable," there is a "general preference for borrowing state limitations period." 462 U.S. at 158 n.12. This preference, however, is not to be " 'mechanically applied' " where state statutes are "unsatisfactory vehicles for the enforcement of federal law." *Id.* at 161-62. Where that is true, the Court stated, "we have declined to borrow state statutes but have instead used timeliness rules drawn from federal law . . ." *Id.* at 162.

The *DelCostello* Court went on to conclude that hybrid fair-representation/breach-of-contract lawsuits fall within this latter category. The Court reasoned that there is "no close analogy in ordinary state law" to such claims, and that the state-law analogies that are available "suffer from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of . . . litigation." *Id.* at 165. Some state statutes—in particular, those governing actions to vacate arbitration awards—"provide very short times in which to sue, and thus "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights." *Id.* at 166.[5] But the alternative state-law analogies—principally, tort statutes—"would preclude the relatively rapid final resolution of labor disputes favored by federal law," *id.* at 168; indeed the Court posited that the grievance-arbitration machinery which lies " 'at the very heart of the system of industrial self-government' " could " 'easily become unworkable' " by the application of tort limitations periods, *id.* at 168-69.

[5] Most states allow only 90 days to file an action to vacate an arbitration award, and it was that time period that the Court in *DelCostello* deemed not "long enough." *See* 462 U.S. at 166 & n.15. Petitioner is thus wrong in implying (*see* Pet. Br. at 20) that *DelCostello* establishes the inadequacy of any limitations period shorter than six months.

Having thus identified the deficiencies in the state-law analogies, the Court in *DelCostello* reasoned as follows:

> These objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is. In this case, however, we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels. We refer to § 10(b) of the National Labor Relations Act . . . [*Id.* at 169]

Given the "family resemblance" and "substantial overlap" between hybrid fair-representation/breach-of-contract claims and the causes of action to which § 10(b) in terms applies, *id.* at 170, the Court stressed "the close similarity of the considerations relevant to the choice of a limitations period" in both instances, *id.* at 170-71:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, as well as the clear congressional indication of the proper balance between the inter-

ests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." [462 U.S. at 170-71; citations omitted]

In two subsequent cases this Court has elaborated on the reasoning of *DelCostello*. In *Wilson v. Garcia*, *supra*, 53 L.W. at 4483, the Court explained that in *DelCostello* "we . . . declined to apply a state statute of limitations when we were convinced that a federal statute of limitations for another cause of action better reflected the balance that Congress would have preferred between the substantive policies underlying the federal claim and the policies of repose." And in *Burnett v. Grattan*, 468 U.S. 42, 52 n.14 (1984), the Court, in refusing to borrow for federal civil rights causes of action under 42 U.S.C. § 1981 a state statute of limitations governing the filing of complaints with a state administrative agency, explained the seemingly contrary decision in *DelCostello* as follows:

> In *DelCostello* we held that the limitations period fixed by § 10(b) . . . for filing unfair labor practice claims with the National Labor Relations Board offered the most analogous limitation period for suits alleging breaches of the collective bargaining agreement. The importance of uniformity in the labor law field and "the realities of labor relations and litigation," informed our decision *not* to adopt a state statute of limitations that would be at odds with the purpose of the substantive federal law. Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases. Moreover, the state administrative statute here, unlike the federal statute we relied on in *DelCostello*, is not functionally related to Congress' policy enacted in the relevant substantive law. [Citations omitted; emphasis in original]

Since *DelCostello* borrowed § 10(b) to govern hybrid fair-representation/breach-of-contract cases because that

statute of limitations is "designed to accommodate a balance of interests very similar to that at stake here," p. 11 *supra*, and since the balance Congress struck in § 10(b) was to allow six months for filing and service, it is especially appropriate in the present context to follow the general rule of resolving "questions of tolling and application" by reference to the borrowed law. *See* p. 8 *supra*. Indeed to do otherwise would disserve the very interests that underlie § 10(b) and that led the Court in *DelCostello* to borrow that statute for fair-representation cases.

Section 10(b) reflects Congress' determination to promote "the relatively rapid final disposition of labor disputes." *DelCostello*, 462 U.S. at 168.[6] Under § 10(b), once an employer and a union resolve a collective-bargaining dispute, the parties ordinarily will know within six months whether that resolution is being challenged. If no challenge is received within that time period, the parties are entitled to treat their agreement as final, and as thereby establishing "the law of the shop"; if a challenge is received, the parties will have the opportunity to address promptly the source of the challenger's dissatisfaction.

DelCostello borrowed § 10(b), rather than state law, precisely because the provision has these consequences; as the Court has explained, § 10(b) "better reflect[s]

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[6] *See also Auto Workers v. Hoosier Corp.*, *supra*, 383 U.S. at 707; *United Parcel Service v. Mitchell*, 451 U.S. 51, 63 (1981); *Clayton v. Automobile Workers*, 451 U.S. 679, 693 (1981). The fact that, under § 10(b), a timely unfair labor practice charge may become the subject of an unfair labor practice complaint issued by the General Counsel of the NLRB at some later date in no way undermines the policy favoring rapid resolution, as petitioner seems to believe, *see* Pet. Br. at 15-16, because statutes of limitations cannot protect potential defendants from prolonged proceedings *once litigation is commenced in a timely fashion.*

the balance that Congress would have preferred between the substantive policies underlying the federal claim and the policies of repose." *Wilson v. Garcia, supra*, 53 L.W. at 4483. Yet as the lower court observed, a rule that required plaintiffs only to file their complaints within six months would mean, for cases brought in federal court, that service need be accomplished only within the time limits established by Rule 4 of the Federal Rules of Civil Procedure which would "increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition." Pet. App. 6a.[7] Such an addition would, by its very nature, substantially delay the point at which a grievance resolution becomes final and thus would alter fundamentally the balance struck by Congress.

Furthermore, fair-representation cases may be filed in state court as well as federal court. *See e.g., Vaca v. Sipes*, 386 U.S. 171 (1967). Rule 4 does not apply in state courts and some states may allow even a longer period of time to effect service, thereby further retarding the interest in rapidly resolving labor disputes. And, in any event, the very fact that absent application of the § 10(b) service requirement, the states would be free to apply their own rules for determining whether the statute of limitations has been satisfied would undermine *DelCostello*'s attempt to establish a uniform rule for

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[7] Rule 4(j) of the Federal Rules of Civil Procedure provides, as follows:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant . . .

By its terms, then, Rule 4(j) allows *at least* four months for effecting service, and a longer period for "good cause."

determining when the policies of repose prevail and when a labor dispute can be deemed to be finally resolved.[8]

D. Petitioner advances two contrary arguments, neither of which can withstand analysis.

(1) Petitioner places his principal reliance on what he terms the "normal federal rule" that a "statute of limitations is satisfied by filing the complaint." Pet. Br. at 7. Petitioner traces this "normal rule" to Rule 3 of the Federal Rules of Civil Procedure, claiming that "every court of appeals which has considered the question has decided that Rule 3 . . . determines what steps are necessary to satisfy the statute of limitations when litigating a federal claim in federal court . . ." Pet. Br. at 7. And petitioner contends that this "normal rule" is controlling here as well:

> [U]nder the reasoning of *DelCostello*, respondents cannot justify turning to section 10(b) to borrow its service requirements unless they can identify "a gap in federal law" that needs to be filled. But no such borrowing is needed because Federal Rule 3 supplies the rule to govern this case. [Pet. at 13]

Petitioner's understanding of Rule 3 is fatally flawed. That Rule does *not* "govern[] the satisfaction of the statute of limitations," Pet. Br. at 8, nor does it "suppl[y] the rule to govern this case," *id.* at 13. *Walker v. Armco Steel Corp., supra*, is squarely contrary to petitioner's theory.

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[8] Petitioner suggests that application of F.R. Civ. P. 4 would not disserve the policy of § 10(b) because "a union or employer . . . could call the district court immediately after the six months has run to learn whether a complaint has been filed against it." Pet. Br. at 14. But what court is the putative defendant to call? As noted in text, fair representation suits may be brought in state or federal court. Moreover, many employers and unions (including all national unions) are subject to jurisdiction in more than one federal court. Thus it is wholly impractical to make a phone call to ascertain whether a complaint has been filed.

In *Walker*, the Court reaffirmed the holding of *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), that in a diversity case state law determines whether a statute of limitations has been satisfied. In doing so, the *Walker* Court recognized the governing force in diversity cases, as in all other federal-court litigation, of a valid Federal Rule of Civil Procedure which "is sufficiently broad to control the issue before the Court." *Walker*, 446 U.S. at 749-50. But the *Walker* Court nonetheless concluded that *Ragan* properly held state law controlling on whether the statute of limitations had been met because " '*there* [*is*] *no federal rule which cover*[*s*] *the point.*' " *Walker*, 446 U.S. at 750 (emphasis added). The Court explained:

> "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." [*Id.* at 750 n.10, *quoting* 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1057, p. 191 (1969)]

Nor is there any other source of federal law which establishes a uniform "rule in federal question cases . . . that the statute of limitations is satisfied by filing a complaint within the required time." Pet. Br. at 6. The cases on which petitioner relies (Br. at 7-8 & n.2), although containing occasionally broader dictum, actually establish a narrower proposition, one that is of no relevance here: in federal-question cases in which the applicable statute of limitations requires that an action be "brought," "begun," "filed," or "commenced" within a specified period of time, Rule 3 controls the determination of what steps are required to satisfy such a requirement.[9] That is, of

[9] That is true of the cases petitioner cites which involved the application of an express federal statute of limitations as well as the cases which involved a borrowed statute of limitations. *Baldwin County Welcome Center v. Brown*, 446 U.S. 147 (1984), discussed at Pet. Br. at 9, is illustrative of the first category. At issue in that case was the timeliness of a complaint under Title VII of the Civil Rights Act of 1964; that statute requires that "a civil action . . . be brought" within 90 days of the issuance of a right-to-sue notice by the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(f)(1). The Court accordingly looked to Rule 3 to see if the action had been "brought" within the requisite time period. *See also Moore Co. v. Sid Richardson Carbon & Gas Co.*, 347 F.2d 921 (8th Cir. 1965) (antitrust suit; 15 U.S.C. § 15b requires that action be "commenced" within four years); *United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978) (suit by United States; 28 U.S.C. § 2415(a) requires that "complaint be filed" within six years); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184 (5th Cir. 1980) (Title VII suit); *Jordan v. United States*, 694 F.2d 833 (D.C. Cir. 1982) (Tort Claims Act suit; 28 U.S.C. § 2401(b) requires that "action is begun" within six months); *Perkin Elmer v. Trans Med. Airways*, 107 F.R.D. 196 (E.D.N.Y. 1985) (suit under Warsaw Convention; 49 U.S.C. § 1502 note requires that suit be "brought" within two years.

The cases petitioner cites involving a "borrowed" statute of limitations are in accord. For example, in *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947), which was discussed by this Court in *Ragan* and on which petitioner relies here, Pet. Br. at 7-8, all that the court decided was that the Federal Rules of Civil Procedure supersede "§ 17 of the New York Civil Practice Act, which fixed the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service." *Id.* at 140. The Second Circuit expressly *declined* to decide whether a service requirement would be applicable if it were "annexed as a condition to the very right of action created." *Id.* at 140-41. *See also Jackson v. Duke*, 259 F.2d 3 (5th Cir. 1958) (borrowing state statute of limitations which requires that action "be commenced . . . within two years"); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984) (borrowing D.C. Code § 12-301(8) which requires that suit be "brought" within three years); *Cohn v. Board of Education*, 536 F. Supp. 486 (S.D.N.Y. 1982) (borrowing N.Y. Civ. Prac. Law § 2412(2) which requires that suit be "commenced" within three years); *Gutierrez v. Vergari*, 499 F. Supp. 1040 (S.D.N.Y. 1980) (same); *Wells v. Portland*, 102 F.R.D. 796 (D. Ore. 1984) (borrowing Ore. Rev. Stat. § 30.275(8) which requires that action be "commenced" within two years).

course, a fair and proper reading of Rule 3, because the Rule in terms defines the "commence[ment]" of an ac-

tion in federal court.[10] But none of the cases petitioner cites, nor any other authority of which we are aware, holds that where the statute of limitations that has been borrowed for a particular federal cause provides that filing and service must take place within a specified period, the judiciary is free to nullify the service requirement of that statute.[11]

(2) Petitioner alternatively argues that "borrowing the service requirement in section 10(b) would seriously harm the policies underlying both *DelCostello* and the DFR because "adoption of a rule requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed." Pet. Br. at 20, 18. Again, petitioner is mistaken.[12]

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[10] *Walker* teaches that in diversity cases, Rule 3 does not govern the determination of when an action is "commenced" for purposes of a state statute of limitations; that is clear from the fact that in *Walker* the Oklahoma statute that was deemed controlling, Okla. Stat. Tit. 12, § 97, in terms defined when "[a]n action shall be deemed *commenced.*" But the Court in *Walker* left open the "role of Rule 3" in federal question litigation. 446 U.S. at 751 n.11. Thus the cases cited by petitioner and discussed in n.10 *supra* can survive *Walker* so long as they are understood to establish only the proposition stated in text, and are not read to hold that under Rule 3 "commencement" necessarily satisfies a statute of limitations.

[11] *See also Howard v. Lockhead-Georgia Co.*, 742 F.2d 612, 613 (11th Cir. 1984):

> As a general rule, an action is "commenced" in federal court by the filing of a complaint. The general rule expressed governs when the statute of limitations merely requires that an action be "brought," "commenced," or "initiated" within a specified time. Here, however, Section 10(b) expressly requires both filing *and* service within a six month period. [Emphasis in original]

[12] Petitioner also suggests that requiring service within six-months would disserve *DelCostello*'s policies in a second way, as such a rule "could . . . have the effect of making the suit against the union untimely, while the suit could proceed against the em-

It is, of course, true that a rule that allows a would-be-plaintiff six months to file a complaint is different—and more favorable to the plaintiff—than a rule that establishes a six-month limit for filing and service. When compared to the former rule, the latter rule does, indeed, "shorten[] the time period within which DFR complaints must be filed"; conversely, when compared to the latter rule, the former rule broadens that time period to precisely the same extent. It is for this very reason that we have argued that the so-called "service requirement" stated in § 10(b) cannot be divorced from the time-period contained in that provision. Pp. 8-9 *supra*. And in arguing that "requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed," petitioner assumes an *a priori* answer to the very question that is in dispute here.[13]

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ployer, or visa versa." Pet. Br. at 20. But that risk exists even if service is not required within six-months, because, in any event, F.R. Civ. P. 4 establishes a deadline for effecting service, *see* n.7 *supra*, and that deadline may be met as to some but not all defendants. Moreover, *DelCostello* teaches that it is *not* contrary to the national labor policy for a fair-representation/breach-of-contract suit to proceed against only the employer or the union, so long as there is not a different limitations period applicable to one defendant. *See* 462 U.S. at 165 ("The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both").

[13] We hasten to add that petitioner's argument greatly overstates the difference between requiring filing within the limitations period and requiring filing and service during that time period. Petitioner assumes that a service requirement necessarily means that service must be received within the limitations period, although as previously noted, the NLRB has reached the opposite conclusion in applying § 10(b). *See* n.9 *supra*. Moreover, even if it were necessary to complete service within six months in order to satisfy § 10(b), petitioner's lengthy discussion of "the vagaries of completing service," Pet. Br. at 19, ignores the fact that, at least in federal court, "[a] summons and complaint may be served . . . by mailing a copy . . . (by first-class mail, postage prepaid) to the person to be served," F.R. Civ. P. 4(c)(2)(C)(ii), and that a de-

Indeed, when all is said and done, petitioner's argument reduces to the proposition that six months is too short a period of time to require both the filing and serving of a DFR/breach-of-contract complaint.[14] What petitioner ultimately asks the Court to do, then, is "balance . . . the policy interests at stake," Pet. Br. at 10 n.4, and decide on its own what is an appropriate period of time to allow fair-representation/breach-of-contract plaintiffs to file and serve their complaints. But as we have seen, statutes of limitations are "borrowed" rather than judicially invented precisely because determining what constitutes an appropriate limitations period is not a judicially-manageable task. And for that same reason, when a statute is borrowed, that statute controls "questions of tolling and application." Pp. 7-8, *supra*.

---

fendant who refuses such service without "good cause" is liable for costs, F.R. Civ. P. 4(c)(2)(D). That is, indeed, how service was effected in this very case, and each defendant acknowledged service within eleven days of mailing. (Section 10(b) does not speak to how service is to be effected and thus, contrary to petitioner's suggestion, *see* Pet. Br. at 21-22, Rule 4 will govern the manner of effecting service regardless of how the instant case is resolved.)

[14] In making this argument petitioner places great weight on his assertion that "the lawyers who are willing to take DFR cases often have little or no prior knowledge of what is required in a DFR suit." Pet. Br. at 17. But a lawyer accepting a fair representation case will be required to research the statute of limitations and surely can be expected to become aware of whatever decision is reached by his Court in this case, just as such a lawyer will learn of the holding of *DelCostello*. And the rules governing how complaints are to be served do not differ for fair-representation litigation, Thus, even assuming *arguendo* the validity of plaintiff's assertion—and in our experience, there is a growing bar of lawyers experienced in representing plaintiffs in fair-representation litigation—that assertion has virtually nothing to do with the issue in this case just as such a lawyer will learn of the holding of *DelCostello*. Indeed, without acknowledging it, petitioner actually is attempting to relitigate the Court's decision in *DelCostello* to borrow an administrative statute of limitations and apply it to a judicial cause of action. *Cf. Burnette v. Gratten, supra.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WILLIAM J. BIRNEY
(Counsel of Record)
WILLIAM G. MAHONEY
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

LOUIS P. MALONE, III
400 1st Street, N.W.
Washington, D.C. 20001

Of Counsel:
DAVID SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

(8)

No. 85-1804

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF RESPONDENT CONSOLIDATED RAIL CORPORATION

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-1241

Counsel for Respondent Consolidated Rail Corporation

November 14, 1986

COUNTERSTATEMENT OF QUESTION PRESENTED

Did this Court's adoption of the six month statute of limitations of Section 10(b) of the National Labor Relations Act for hybrid breach of contract/breach of the duty of fair representation cases include the plain statutory requirement that the complaint be both filed and served in order to satisfy the statute of limitations?

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STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure and Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), are set forth in the petition for certiorari.

Rule 4(j) of the Federal Rules of Civil Procedure is set forth in Consolidated Rail Corporation's brief in response to the petition for writ of certiorari.

Rule 4(a) of the Federal Rules of Civil Procedure provides:

> (a) Summons: Issuance.
>
> Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

Rule 4(c)(2) provides:

> (c) Service.
>
> . . .
>
> (2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.
>
> (B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal, or by a person specially appointed by the court for that purpose, only—
>
> (i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. §1915, or of a seaman authorized to proceed under Title 28, U.S.C. §1916,
>
> (ii) on behalf of the United States or an officer or agency of the United States, or

> (iii) pursuant to an order issued by the court stating that a United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.
>
> (C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—
>
> (i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or
>
> (ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).
>
> (D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.
>
> (E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

Rule 4(g) provides as follows:

> (g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under sub-division (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not effect the validity of the service.

COUNTERSTATEMENT OF THE CASE

The facts of this case are not in dispute. Petitioner Thomas West was employed by Respondent Consolidated Rail Corporation (''Conrail''), from February 9, 1981 until November 27, 1981, when he was dismissed for unauthorized possession of alcoholic beverages. On February 9, 1984, Conrail reinstated Petitioner, reducing his discipline from discharge to suspension without back pay. Petitioner returned to work February 14, 1984, accepting the benefits of the company's decision. He has since been working for New Jersey Transit pursuant to employee transfer agreements reached under the Northeast Rail Service Act of 1981. Petitioner communicated no objection to the company's decision from the date of reinstatement to the date of the filing of the complaint in this matter, when he apparently decided he was dissatisfied with not having gotten back pay.

Respondents moved for summary judgment on several theories, including the argument that this action was barred by the six-month statute of limitations found in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), made applicable to hybrid breach of contract/breach of duty of fair representation (''DFR'') cases under the Labor Management Relations Act, 29 U.S.C. §185, *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and adopted by the Court of Appeals for the Third Circuit to apply to breach of contract/duty of fair representation claims under the Railway Labor Act, 45 U.S.C. §§151-188. *Sisco v. Consolidated Rail Corporation*, 732 F.2d 1188 (3d Cir. 1984). Respondents argued that since the complaint, although filed within six months of the alleged accrual date, was not served until well after the six-month period had expired, the complaint was time-barred. App. 17a.[1]

For the purposes of this action, Respondents and Petitioner agree that the summons and complaints in this case were mailed to Respondents on October 10, 1984 and Respondents acknowledged service on dates ranging from October 12, 1984 through November 1, 1984. In addition, for the purposes of this proceeding, it is undisputed that September 24, 1984, when the complaint was filed, was less than six months after the statute of limitations began to run, and that both October 10th, when the complaints were mailed and October 12th, when the first acknowledgment was made, were more than six months after the statute began to run.

[1] Any reference to ''App.'' means the Appendix to the Petition for Writ of Certiorari in this case, followed by the page on which the cited argument can be found.

The District Court granted Respondents' motions, holding that because §10(b) requires unfair labor practice charges to be both filed and served within six months, a fair representation complaint must also be filed and served within the six-month limitation period. App. 14a-17a. The Court of Appeals for the Third Circuit affirmed the District Court's decision, on the basis that the balance of interests struck in *DelCostello* could only be met by requiring both filing and service of the complaint in order to satisfy the statute of limitations period. App. 3a-13a. The Court acknowledged that application of the service provision contained in Rule 4(j) of the Federal Rules of Civil Procedure, in the absence of the service requirement plainly contained in §10(b) of the National Labor Relations Act (''NLRA''), would engraft an additional four months onto the six-month time period within which a plaintiff must serve the complaint and notify the defendant of a pending action. The Appeals Court concluded that this would effectively postpone the finality of any labor dispute, and eliminate the uniformity of limitations periods sought by the Court in *DelCostello*. App. 6a.

SUMMARY OF ARGUMENT

The six-month statute of limitations in Section 10(b) of the NLRA, 29 U.S.C. §160(b) (''§10(b)''), adopted by this Court in *DelCostello* for hybrid breach of contract/DFR cases, includes the plain requirement that the complaint be both filed and served within six months of the date upon which the action accrued.

The issue before the Court in this case is whether its adoption of the §10(b) statute of limitations for hybrid breach of contract/DFR claims includes the service of process requirement plainly set forth in the statutory language. Petitioner West contends that such an interpretation of the *DelCostello* decision is in error. He highlights in endless detail the hardships which may befall a DFR plaintiff trying to make his way into court, and indicates that there is no need to adopt the service rule in §10(b) since Rules 3 and 4(j) of the Federal Rules of Civil Procedure will suffice.

It is Respondent Conrail's position that the service requirement should be included as part of the §10(b) statute of limitations borrowing. As set forth below, the service requirement is clearly an integral part of the statute, and its application conforms with traditional federal policies regarding borrowing of statutory limitation periods to fill gaps in federal law. Moreover, there is nothing unfair or prejudicial to this or any Petitioner by imposing the service requirement, since service is now within the control of the Petitioner. Finally, inclusion of the service requirement in the statutory borrowing

promotes the public policy goals forming the basis for the Court's decision in *DelCostello, i.e.*, specifically, promptness and finality in the resolution of labor disputes and uniformity of limitation periods for similar claims.

ARGUMENT

I. BORROWING BOTH THE FILING AND SERVICE REQUIREMENTS OF SECTION 10(b) IS CONSISTENT WITH TRADITIONAL FEDERAL POLICY.

All parties agree that the statute of limitations which applies to a hybrid breach of contract/DFR claim under the Railway Labor Act is the six-month statute of limitations of §10(b) of the NLRA, 29 U.S.C. §160(b), as adopted by the Supreme Court in *DelCostello,* and applied to Railway Labor Act cases by the Third Circuit Court of Appeals in *Sisco v. Consolidated Rail Corporation,* 732 F.2d 1188 (3d Cir. 1984). The instant case is such a claim.

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), states in pertinent part:

> . . . no complaint shall issue based upon any unfair labor practice accruing more than six months prior to the filing of the charge with the Board *and the service of a copy thereof* upon the person against whom such charge is made . . . . (emphasis added)

Petitioner argues that since *DelCostello* was based upon the Court identifying the most suitable statute of limitations to fill a gap in federal law,[2] the statutory borrowing need not include the service requirement, because there is no gap to fill regarding service and satisfaction of the limitations period. Petitioner West alleges that Federal Rules 3 and 4(j) supply the rule in this case. Pb13-16;[3] *see also Ellenbogen v. Rider Maintenance Corp.*, 794 F.2d 768 (1986).

As set forth below, Petitioner's argument is without merit. The fact that the service requirement is an integral part of the statute of limitations compels its adoption, since this is consistent with federal policy regarding borrowing of limitations statutes to fill gaps in federal law. In addition, Rules 3 and 4(j) do not apply in place of the service requirement of §10(b), but rather, in conjunction with it. Accordingly, the borrowing of the §10(b) statute of limitations clearly includes service of process.

[2] 462 U.S. at 169, n.2.

[3] "Pb," followed by a page number refers to Petitioner's Brief and the specific page referenced.

A. The Service Requirement Is An Integral Part Of The Statute Of Limitations.

The majority of courts which have reviewed the §10(b) statute of limitations have found that the service requirement is an integral part of the statute. *See, Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); *West v. Conrail,* 780 F.2d 361 (3d Cir. 1985); *Williams v. Greyhound Lines, Inc.*, 756 F.2d 818 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.*, 755 F.2d 1543 (11th Cir. 1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Simon v. Kroger Co.*, 743 F.2d 1544 (11th Cir. 1984), *cert. denied,* 105 S.Ct. 2155 (1985); *Thomsen v. United Parcel Service, Inc.*, 792 F.2d 115 (8th Cir. 1986), *cert. pending sub nom. Local 710, International Brotherhood of Teamsters v. Thomsen*, No. 86-340; *Dzieken v. Entenmann's, Inc.*, No. 85 C 9544, (N.D. Ill., E.D., June 2, 1986); *Taylor v. Pathmark*, No. 85-4253 (E.D. Pa., June 10, 1986); *Waldron v. Motor Coils Manufacturing Co.*, 606 F. Supp. 658 (W.D. Pa. 1985), *aff'd*, 791 F.2d 923 (3d Cir. 1986); *Ellenbogen v. Rider Maintenance Corp.*, 621 F. Supp. 324 (S.D.N.Y. 1985); *Hoffman v. United Markets, Inc.*, 117 L.R.R.M. 3229 (N.D. Cal. 1984); *Thompson v. Ralston Purina Co.*, 599 F. Supp. 756 (W.D. Mich. 1984) (Section 10(b)'s filing and service requirements apply).[4]

In addition, in the context of other statutes of limitations borrowed by federal courts, it has been held repeatedly that where service of process is plainly part of the statutory limitations language, it is an integral part of the statute of limitations, and thus must be part of the borrowing. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Calhoun v. Ford*, 625 F.2d 576 (5th Cir. 1980); *Fischer v. Iowa Mold Tooling Company, Inc.*, 690 F.2d 155 (8th Cir. 1982); *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984).

With regard to *Ragan, supra,* a diversity case involving the question of whether the applicable Kansas statute of limitations should be applied in federal court with or without its service requirement, the Court held that since service was a necessary part of the statute, it must be recognized and applied as part of the statute. Evidence that the Court in *Ragan* considered the service requirement an integral part of the statute was the fact that *another* Kansas statute existed, which provided that a civil action be commenced by filing only, a rule identical to Rule 3 of the Federal Rules of Civil Procedure.

[4] *Contra, Simon v. Kroger Co.*, 105 S.Ct. 2155 (1985) (dissent from denial of certiorari); *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985); *Ellenbogen v. Rider Maintenance Corp.*, 794 F.2d 768 (2d Cir. 1986); *LaTondress v. Local No. 7, IBT,* 102 F.R.D. 295 (W.D. Mich. 1984) (only filing limitation applies).

Ely: *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974). In *Walker v. Armco Steel Corp., supra*, this Court used the same analysis relative to the Oklahoma statute of limitations and the service requirement contained therein.[5]

When a statute of limitations is borrowed by the Court, all aspects of that statutory period, including those provisions regarding tolling and satisfaction, are borrowed.

> Any period of limitation . . . *is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.* Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. *In virtually all statutes of limitations the chronological length of the limitations period is interrelated with provisions regarding tolling, revival and questions of application.* (emphasis added)

Johnson v. REA, 421 U.S. 454, 463, 464 (1975); *see also Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980).

Logic dictates that a limitations period is framed by a commencement date and an ending date which function as its definitive boundaries. The ending date is as important as the accrual date. The §10(b) statutory period, by its terms, runs from the date on which the action accrued to the date of filing and *service* of the charge. It could not be clearer. The *DelCostello* decision made no mention of the necessity to carve out the service requirement. In fact, the Court was silent on that issue. There is no reason why the six-month period would be borrowed and the filing and service requirement would not. *Howard v. Lockheed-Georgia Co.*, 742 F.2d at 613, 614. Service creates the outside boundary for and is clearly part and parcel of the limitations period.

[5] "The substantive link of §97 [dealing with service of process] to the statute of limitations is made clear as well by another provision of Oklahoma law . . . Okla. Stat., Tit. 12, §151 (1971) . . . is the state-law corollary to Rule 3. However, §97, not §151, controls the commencement of the lawsuit for statute of limitations purposes. [Citation omitted] Just as §97 and §151 can both apply in state court for their separate purposes, so too §97 and Rule 3 may both apply in federal court in a diversity action." 446 U.S. at 752, n. 13. And as set forth in Subsection B hereinafter, so too can Section 10(b) and Rules 3 and 4(j) coexist.

B. Traditional Federal Borrowing Policy Compels The Adoption Of The Entire Statute Of Limitations, Including Both The Filing And Service Requirements.

Petitioner argues that because the Court in *DelCostello* stated that its reason for borrowing the §10(b) statute of limitations was to fill a gap in federal law, the service portion of §10(b) should not be considered part of the borrowing, since, as to tolling or satisfaction of the statute of limitations, there was no gap to be filled. According to Petitioner, the "normal rule" in federal question cases is that a statute of limitations is satisfied by filing the complaint and no more (Pb6), even though he concedes that "[t]his Court has never squarely decided that Rule 3 has this significance. . ." (Pb8). In fact, this Court has declined to address this issue where, as in the instant case, the statute of limitations specifically provided that it was not satisfied absent service of the complaint.

Typically, there are two types of statutes of limitations, those that are silent as to tolling and satisfaction, and those which require something more than filing to satisfy the terms of the statute. The statutes of limitations which are silent are generally viewed as being satisfied by filing pursuant to Federal Rule 3. These are more common in federal question cases. It is these cases, with silent statutes of limitations, in which the courts have held that filing alone satisfies Rule 3.[6] However, as to those statutes of limitations which require service, there is no "normal rule." Not only has the Court never squarely addressed the issue as to the role of Rule 3 in satisfying a statute of limitations requiring service in a federal question case (hence our presence here), but it has specifically declined to discuss it.

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), a diversity case, the Court dealt with the issue of whether a borrowed state statute of limitations should be satisfied by filing of a complaint under Federal Rule 3, or by the specific service requirements of the state statute. In deciding that the service requirement of the state statute should apply, this Court pointed out that there is no indication that Rule 3 was ever intended to satisfy the statute of limitations. Rule 3 states: "A civil action is commenced by filing a complaint with the court." It governs "the date from which various timing requirements of

[6] *See*, e.g., *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947); *Moore v. Sid Richardson Carbon & Gas Co.*, 347 F.2d 921 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966); *U. S. v. Wahl*, 583 F.2d 285 (6th Cir. 1978); *Cohen v. Board of Education*, 536 F. Supp. 486 (S.D.N.Y. 1982); *Wells v. Portland, 102 F.R.D.*, 796 (D. Ore. 1984) *Gutierrez v. Vegari*, 499 F. Supp. 1040 (S.D.N.Y. 1980); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1943 (1985).

the Federal Rules begin to run, but does not affect state statutes of limitations." *Walker, supra,* at 751. The Court specifically declined to address the issue of the role of Rule 3 as a tolling provision for statutes of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law. *Walker, supra,* at 751, n.11.

The cases which hold that Rule 3 satisfies the statute of limitations were all decided prior to the effective date of the 1982 Amendments to the Federal Rules of Civil Procedure or were decided based on other case law arising prior to 1983.[7] The standard line of reasoning in these cases evolved from an interpretation of the legislative history of Rule 3, indicating that because the initial formulation of Rule 3 by the Federal Rules Advisory Committee involved proposed language imposing a specific time requirement on service, and that language was ultimately eliminated from the Rule as enacted, Rule 3 should be construed as satisfying the statute of limitations. *Messenger v. United States,* 231 F.2d 328, 329 (2d Cir. 1956); *accord, Moore v. Sid Richardson Carbon & Gas Co.,* 347 F.2d 921 (8th Cir. 1965); *Metropolitan Paving Co. v. Int'l Union of Operating Engineers,* 439 F.2d 300 (10th Cir. 1971), *cert. denied,* 404 U.S. 829 (1971); *U.S. v. Wahl,* 583 F.2d 285 (6th Cir. 1978). "The continued validity of this line of cases, . . . must be questioned in light of the *Walker* case, even though the Court expressly reserved judgment about federal question actions." 128 Cong. Rec. H-9850 (daily ed. Dec. 15, 1982) *reprinted in* 96 F.R.D. 116, 120, n.14.

Notes of the The Advisory Committee on Rules which accompany Federal Rule 3 actually state:

> When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of a complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. . . . The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

[7] H.R. 7154, enacting Amended Rule 4, became effective February 26, 1983.

There is no basis in the Rules or the Advisory Committee Notes to conclude that Rule 3 specifically satisfies a statute of limitations which contains its own service requirements. Without a strong bias by Congress dictating which way Rule 3 should be interpreted, the Walker analysis should prevail.

Although the Notes of the Advisory Committee on Rules clearly do not state that Rule 3 is to be applied to satisfy the statute of limitations, they do provide some insight as to why courts may have applied Rule 3 in that manner. Prior to the 1982 Amendments, as soon as a plaintiff filed his complaint, control of the action was transferred from the plaintiff to the Clerk. The Clerk had the obligation to send the complaint to the marshal for service. There was no apparent concern over the timeliness of service, since the marshal's involvement was accompanied by a strong presumption of validity in judicial eyes. Siegel: *Changes In Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure,* 96 F.R.D. 81, 101. Under those circumstances, it may well have been considered prejudicial to the plaintiff to allow a particular limitations period to continue to run after the filing of the complaint, when the speed and manner of service of process was no longer in the plaintiff's control.

C. The 1982 Amendments To The Federal Rules Provide That Plaintiff Controls Service Of Process.

The 1982 Amendments to the Federal Rules eliminated any basis (if, indeed, there ever was one) for concluding that the filing of a complaint pursuant to Rule 3 automatically satisfies the statute of limitations. The Amendments changed Rules 4(a) and 4(c) to the extent that service of process may now be accomplished under Rule 4(c)(2)(C)(ii) by mailing a copy of the complaint to the defendant, with an acknowledgment form which the defendant must date, sign and return to the plaintiff. Service is now *within the control* of the plaintiff.

In addition to the changes made in Rules 4(a) and 4(c), the Amendments established a new Rule 4(j) which requires that service be accomplished within 120 days of the date the complaint is filed. Such a requirement is a natural outgrowth of the changes in 4(a) and (c), since service is now the responsibility of the plaintiff, and thus could be prone to time delays.

As discussed in Section III hereinafter, Petitioner's argument that Rules 3 and 4(j) should be applied in the absence of the service of process requirement of §10(b), adds *four-months* to the six-month limitation period beyond which a defendant knows he is safe from suit. The legislative history makes it clear, however, that neither Congress nor the Supreme Court intended Rule 4(j) to have that affect.

> If the law provides that the statute of limitations is tolled by filing and service of the complaint, then a dismissal . . . for failure to serve within the 120 days would, by the terms of the law controlling the tolling, bar the plaintiff from later maintaining the cause of action. 128 Cong. Rec. H-9850 (daily ed. Dec. 15, 1982), 96 F.R.D. at 120.
>
> . . .
>
> The same result obtains even if service occurs within the 120 day period, if the service occurs after the statute of limitations has run. Id., n.15.
>
> If the law provides that the statute of limitations is tolled by filing alone, then the status of the Plaintiff's cause of action turns on the Plaintiff's diligence. 96 F.R.D. at 120.

In *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984), the Court of Appeals specifically rejected the argument that Rule 4(j) should be engrafted onto a state statute of limitations requiring both filing and service, and thus, effectively expand by 120 days the period during which the plaintiff could serve the defendant. The Court stated:

> This is a dubious proposition at best in light of *Walker*. . . . Moreover, the legislative history of the amendments shows that Congress recognized the implications of Walker when it considered the amendments to Rule 4(c) . . . and that Congress specifically considered and rejected the argument plaintiff now advances.
>
> 752 F.2d at 42.

Simply put, if both filing and service are required by statute, then the service must be both within the statutory period *and* within 120 days of the filing of the complaint.

The *Walker* and *Morse* cases, and the legislative history applicable to Amended Rule 4 stand for the proposition that the filing of a complaint under Rule 3 does *not* automatically satisfy the statute of limitations. Accordingly, it does not conflict directly with a borrowed limitations statute requiring both filing and service. Rule 3 and the statute of limitations can "exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Walker v. Armco Steel Corp.*, 446 U.S. at 752.

Petitioner has provided no compelling argument for distinguishing the borrowing of a federal statute of limitations from the traditional method of borrowing a state limitations period. Petitioner asserts that when courts borrow a statute of limitations in federal question cases, Rule 3 has always been applied to satisfy the statute of limitations. On the contrary, although, as stated previously, the role of Rule 3 has not been addressed, borrowed statutes of limitations in federal question cases have been interpreted as including all of their specific tolling and satisfaction requirements, as in diversity cases. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Johnson v. REA*, 421 U.S. 454 (1975).[8]

> *In cases based upon federal question jurisdiction, if there are relevant statutory provisions indicating what steps must be taken in order to toll the statute of limitations, they are controlling and the application of Rule 3 is not involved.* However, if the federal statute is silent as to when the statute of limitations is tolled, then the absence of a statutory standard, and the desire to maintain uniformity of procedure, would make the test for commencement in Rule 3 applicable. 4C. Wright and A. Miller, *Federal Practice and Procedure*, §1056, p.177.

The §10(b) service requirement should be considered an integral part of the borrowing, existing in conjunction with Federal Rules 3 and 4(j). "There is no rational basis for departing from traditional standards merely because the borrowed statute is of federal, rather than state origin." *Dzieken v. Entenmann's, Inc., supra*, at 7.

Finally, if the courts were to distinguish borrowing a state rather than a federal limitations period, to the extent that the service requirement would be applied in the former case and not in the latter, then the courts, in effect, would be giving greater recognition to state substantive law than corresponding

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[8] *See* discussion in Respondent, New Jersey Transit's Brief, p.13, relative to *United States v. Matles*, 356 U.S. 256 (1958); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Burrell v. La Follette Coach Lines*, 97 F. Supp. 279 (E.D. Tenn. 1951), all federal question cases in which Rule 3 has not been applied automatically to satisfy the limitations requirement.

federal law in the same context. Such a situation cannot be the intent of either Congress or this Court.

II. REQUIRING BOTH FILING AND SERVICE TO SATISFY THE STATUTE OF LIMITATIONS IS NOT UNFAIR OR PREJUDICIAL TO PETITIONER.

Petitioner West raises the specter that requiring service of process to satisfy the statute of limitations will cause great hardship to plaintiffs. He suggests numerous examples of ways in which this will occur, none of which are sufficiently compelling to justify carving out the service of process requirement from the §10(b) limitations period.

Petitioner states that it may be difficult to ascertain where the defendants are. He alleges that even if a plaintiff can find the defendants, if any defendant is located across the country, it might be necessary to file the complaint as much as a month ahead of time in order to be sure that service is perfected. However, West fails to acknowledge the uniqueness of a breach of contract/DFR claim. Unlike other types of cases, the plaintiff in this type of action is uniquely familiar with the defendants, and undoubtedly knows where they can be located for service of process. After all, one defendant is the union of which plaintiff has been a member, and one is his employer — both relatively stationary entities. Furthermore, it is difficult to think of a breach of contract/DFR case in which a plaintiff could not sue both entities locally, since under the Federal Rules, a defendant can be sued in the state in which he does business.[9] Surely both the employer and the union are doing business and have offices at or close to the plaintiff's workplace. Even, if for some reason, distance is involved, a plaintiff can use overnight mail or courier services, reducing the necessary time for service to several days at the most.[10]

Petitioner argues that defendants may attempt to evade service and that such avoidance may ultimately prevent the plaintiff from ever completing service. In a breach of contract/DFR case, it is unlikely that a union, whose representatives must be highly visible in order to do their jobs, or an employer, who must also do business on a day-to-day basis, could successfully evade service. Moreover, this is the same objection that was raised when the service-by-mail rule was enacted as part of Rule 4, and neither Congress nor the Advisory Committee found it compelling enough to eliminate mail service as

[9] *See* 28 U.S.C. §1391(c), Rule 17(b) and 4(d)(3) of the Federal Rules of Civil Procedure.

[10] It is doubtful that a plaintiff could serve a defendant across the country in a breach of contract/DFR case in any event, since long-arm jurisdiction under the Federal Rules does not stretch past 100 miles for a case of this sort.

a viable method to complete the process. 128 Cong. Rec. H-9850, 96 F.R.D. at 118.

A plaintiff may choose any of several methods to serve the complaint. He may choose the method of service provided by the forum state (Rule 4(c)(2)(C)(i)). He may use a private process server (Rule 4(c)(2)(A)), or mail method of service (Rule 4(c)(2)(C)(ii)). In addition, he may request that the court have a marshal perfect service, in cases where he suspects it may be difficult (Rule 4(c)(2)(B)(iii)).

Each method has its own manner in which proof of service can be obtained. If plaintiff uses a private process server he can obtain proof by affidavit of the process server. If he uses the marshal, he can obtain the marshal's proof of service. If the plaintiff serves by mail, he can use the acknowledgment form sent to and returned by the defendant as his proof. It should be noted that failure to produce an executed acknowledgment form or proof of service *does not affect the validity of service.* Rule 4(g); *see Morse v. Elmira Country Club,* 752 F.2d at 40. Any proof of actual notice will suffice.

Petitioner suggests that requiring service will produce "battles over service issues." On the contrary, certainty of the date of service can be assured in a breach of contract/DFR case, just as it is for any other complaint which must be served under the Federal Rules within 120 days of the date it is filed. As of this date, there are only thirteen litigated cases involving disputes over the application of the 120-day service requirement under Rule 4(j), and failure to perfect service by mail in a timely manner. Not *one* of them involves an issue as to the exact date of service and whether or not service was completed within or outside the 120 day time limits.[11] There is no reason that such a question should arise more frequently in the statute of limitations context then in the 4(j) context. A plaintiff has the obligation to be diligent in

[11] *Wei v. State of Hawaii*, 763 F.2d 370 (9th Cir. 1985); *Braxton v. U.S.*, No. 85-5403 (E.D. Pa. 1986); *Boykin v. Commerce Union Bank of Union City, Tennessee*, 109 F.R.D. 344 (W.D. Tenn. 1986); *Horsey v. Edward J. Bradley, et al.*, Nos. 84-4264 and 84-4265 (E.D. Pa. 1985); *Williams v. Allen*, 616 F. Supp. 653 (E.D.N.Y. 1985); *Olympus Corp. v. Dealer Sales & Service, Inc.*, 107 F.R.D. 300 (E.D.N.Y 1985); *Griffin v. Argonne National Laboratory, et al.*, No. 83 C 7736 (N.D. Ill. 1985); *Martin v. City of New York*, 627 F. Supp. 892 (E.D.N.Y. 1985); *Korkala v. National Security Agency/ Central Security Service*, 107 F.R.D. 229 (E.D.N.Y. 1985); *Brown v. Rinehart*, 105 F.R.D. 532 (D.C. Ark. 1985); *Lammers v. Conrad*, 601 F. Supp. 1543 (E.D. Wis. 1985); *Coleman v. Greyhound Lines, Inc.*, 100 F.R.D. 476 (D. Ill. 1984). All of these cases involve whether or not plaintiff used due diligence in trying to perfect service, whether or not there are any equitable tolling arguments, and whether or not the court should dismiss the action for failure to serve in a timely fashion, or grant the plaintiff more time.

his attempts to complete and provide proof of service. He must merely do it within six months in order to satisfy the statute.

Petitioner states that borrowing the service requirement could have the effect of making the suit against one party timely, and against the other party untimely. That is true. However, unless the plaintiff's motivation involves seeking out the "deeper pocket", such a result should be inconsequential, since the burden on the plaintiff is the same whether or not all the defendants are timely served. In a breach of contract/DFR case, to prevail against either party, the plaintiff must not only show that the discharge or discipline was contrary to the contract, but also that the union breached its duty. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976). The employee may sue one defendant, the other, or both, but the case he must prove is the same in any event. *DelCostello,* 462 U.S. at 165.

Finally, despite Petitioner's litany of reasons why requiring service is prejudicial to the interests of a plaintiff in a breach of contract/DFR case, none of these arguments are provided in his own defense. In fact, Petitioner West has never indicated any justification for his failure to serve the Respondents until almost three weeks after the Complaint was filed. In the event that Petitioner had acted with due diligence and still had problems serving Respondents, he, like any other plaintiff, could always have alleged circumstances which would justify an equitable tolling of the limitations requirement. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965). His failure to do so speaks for itself.

III. BORROWING THE SECTION 10(b) SERVICE REQUIREMENT IS NECESSARY IN ORDER TO MEET THE DELCOSTELLO PUBLIC POLICY GOALS OF PROMPTNESS AND FINALITY IN THE RESOLUTION OF LABOR DISPUTES, AND UNIFORMITY OF LIMITATION PERIODS FOR SIMILAR CLAIMS.

Petitioner West contends that the Court, in *DelCostello,* did not intend to adopt the service of process portion of §10(b) because the service requirement serves a different function in an administrative case than in a judicial proceeding, and because the service requirement would allegedly "frustrate the policies underlying *DelCostello,*" endangering the enforcement of the duty of fair representation, Pb. 16. He gives a painfully detailed description of the hurdles which a DFR plaintiff must overcome in order to get into court, and essentially contends that service of process would be just one more unfair burden imposed upon the Petitioner, frustrating his right to have unjust discipline set aside. Petitioner's argument is unpersuasive.

DelCostello and supporting law indicate clearly that the borrowing of the §10(b) limitation period is an adoption of the statutory period as a whole, including its service requirement.[12] In *DelCostello,* the Court reviewed the development of the hybrid breach of contract/DFR claim, and discussed the need to borrow a suitable statute of limitations or other rule of timeliness to govern such a claim since there is no federal statute of limitations expressly applicable. The Court concluded that the appropriate time period depended upon ascertaining which federal interests, if any, were at stake in a breach of contract/DFR case. The Court recognized the necessity to uphold the well established federal interest in prompt and final resolution of labor disputes, *see Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966), and the need for uniformity of limitations periods.

After reviewing statutory limitations periods appropriate for borrowing, this Court chose the six-month period contained in §10(b) of the NLRA, referring to it as a time period "actually designed to accommodate a balance of interests very similar to that at stake here." *DelCostello,* 462 U.S. at 169. The Court pointed out that a breach of a union's duty of fair representation is often an unfair labor practice, characterizing the two types of actions as including "a substantial overlap" of the same claims. Finally, the Court relied on Justice Stewart's concurrence in *United Parcel Service v. Mitchell,* 451 U.S. 56 (1981), holding that the §10(b) six-month statute of limitations period is the most appropriate timeliness requirement because it is attuned to the proper balance of federal interests in promptness and finality of labor disputes and an employee's right to have unjust discipline set aside.

Assuming *arguendo* that Petitioner's theory prevailed, *i.e.*, that the service requirement contained in §10(b) did not apply, and that Federal Rules 3 and 4(j) governed both the satisfaction of the statute of limitations and filing and service of a breach of contract/DFR complaint, then a plaintiff could presumably file his complaint at the end of the six month period and wait an additional 120 days days in order to perfect service. A defendant in such a case would be required to wait 120 days *beyond* the six month statutory period in order to be assured that he was no longer vulnerable to suit — a period of time fully 66% greater than six months, and greater than the same defendant would be required to wait in order to be assured he was not being charged with an unfair labor practice under the NLRA. See *Dzieken v. Entenmann's,* No. 85 C 9524, at 8. Surely, this would eliminate the uniformity of limitations periods sought by this Court and recognized as being so important.

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[12] *See* cases cited on p. 7.

Furthermore, in *DelCostello,* this Court reviewed many statutory periods beyond six months, including one year, and found them to be inappropriate because, in this context, they would conflict with the federal interest in the rapid resolution of labor disputes. The Court chose the §10(b) period because it did *not* conflict with this objective.

Petitioner West raises the argument that the service of process provisions of §10(b) should not be considered part of the borrowing for breach of contract/DFR claims, because the administrative NLRA procedures are different from judicial procedure. Pb 7. However, this is precisely the argument which the Supreme Court addressed and dismissed in a footnote to its opinion:

> . . . With all respect, we think that this observation while undoubtedly correct, is beside the point . . . we are applying a different cause of action, not because the legislature enacting that limitation provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law . . . 462 U.S. at 169, footnote 21, referring to United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981).

The purpose of a statute of limitations is to provide a time after which the defendant is put on notice that he no longer has to worry about being sued. The defendant is first notified that a claim is being pursued against him by *service* of that claim. It makes little difference whether it is a charge being filed with the NLRB or a complaint being filed in court — in either event, the defendant cannot rest until he knows that he is no longer vulnerable to a possible claim. Therefore, service has the same effect in both contexts.

Petitioner suggests that a logical extension of the argument supporting adoption of the service of process requirement would be to require the adoption of all of the other procedural requirements of §10(b), and indeed, many of the procedural rules of the NLRB not even contained in §10(b). Pb9, n.3; Pb17, n.7. However, such a suggestion stretches the clear intent of the Court beyond reason. In *DelCostello,* this Court indicated repeatedly that it was adopting the six-month *limitations period* of §10(b). Since the limitations period has as its boundaries the accrual date and the date of service, the service of process requirement is logically a part of the borrowing of the limitations period. This is not true of the remainder of §10(b), or any NLRB procedural rules outside of §10(b).

Failure to include the service requirement as an integral part of the §10(b) limitations period runs counter to the precise policy reasons this Court borrowed the §10(b) limitations period in the first place. It would prolong the

labor dispute, postpone its finality, and eliminate the uniformity between limitations periods for similar labor claims. Accordingly, the borrowing of the §10(b) statute of limitations for hybrid breach of contract/DFR cases must include the service provision.

CONCLUSION

The borrowing of the six-month statute of limitations in §10(b) for hybrid breach of contract/DFR cases should be read to include the service requirement since such an interpretation is consistent with traditional federal borrowing policies and is an interpretation which is not prejudicial to Petitioner. In addition, inclusion of the service requirement promotes the public interest in prompt and final resolution of labor disputes and the need for uniformity in limitations periods for similar causes of actions.

Accordingly, Respondent Conrail respectfully requests that this Court affirm the decision of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

LUCY S. L. AMERMAN
JOHN B. ROSSI, JR.
BRUCE B. WILSON

COUNSEL FOR RESPONDENT
CONSOLIDATED RAIL CORPORATION

No. 85-1804

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THOMAS WEST,
Petitioner,

v.

CONRAIL, a foreign corporation;
BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES,
LOCAL 2906, a foreign corporation;
NEW JERSEY TRANSIT, a corporation of
the State of New Jersey;
and ANTHONY VINCENT,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

REPLY BRIEF FOR PETITIONER

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3740

Attorneys for Petitioner

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CONRAIL, a foreign corporation;
BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES,
LOCAL 2906, a foreign corporation;
NEW JERSEY TRANSIT, a corporation of
the State of New Jersey;
and ANTHONY VINCENT,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

Petitioner's opening brief argued that, in hybrid suits for breach of collective bargaining agreements and the duty of fair representation ("DFR"), the Court should apply the normal federal rule, based on Rule 3 of the Federal Rules of Civil Procedure, that a complaint stating a federal claim is timely if it is filed with the Court before the statute of limitations expires. The brief also explained that, by employing the portion of section 10(b) of the National Labor Relations Act ("NLRA") which also requires service

within the limitations period, the court below improperly wrenched that rule out of the context of National Labor Relations Board ("NLRB") procedures for which it was designed, and that, in the context of federal court litigation, the effect of the rule would be very different from its impact in NLRB practice. Finally, the brief acknowledged that, although this difference in impact could be lessened by importing into federal DFR litigation various other NLRB rules pertaining to timeliness, such a solution presents its own difficulties that ought to be avoided.

Different respondents accept and reject different aspects of petitioner's contentions. As a result, respondents have failed to establish a coherent rationale, other than the desire to cut back on DFR suits, for applying to DFR litigation the rule that NLRB unfair labor practice charges must be served on the charged party within six months of the unfair labor practice, as well as filed with the Board.

1. The Normal Rule Requires Only Filing to Satisfy the Statute of Limitations in Federal Question Cases.

Petitioner's opening brief demonstrated that, ever since Judge Learned Hand's opinion in *Bomar v. Keyes,* 162 F.2d 137, 140 (2d Cir. 1947), this Court and the lower courts have consistently assumed that, unless Congress has specified a different procedure for a particular federal cause of action, Rule 3 determines what a plaintiff must do in federal question cases in order to comply with a statute of limitations: *i.e.*, the plaintiff is required to "fil[e]" a "complaint" with the Court. Petitioner's Br. at 7-10, *citing Ragan v. Merchants Transfer,* 337 U.S. 530, 533 (1949); *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 149 (1984), and numerous lower court decisions.

Respondent employers nonetheless argue that there is no normal federal rule for federal question cases. New Jersey Transit Br. at 12; Conrail Br. at 9. They acknowledge that many lower court decisions treat Rule 3 as stating such a rule, but contend that those decisions are inconsistent with this Court's decision in *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). *Walker* was a diversity case in which the question was whether, by pursuing a state cause of action in federal court, a plaintiff could avoid a requirement of service within the limitation period that the state itself had placed on the state cause of action. The Court reasoned that it would be "inequitable" for the federal courts and state courts to apply different rules, because the federal court plaintiff could obtain an advantage over a state court plaintiff, "solely because of the fortuity that there is diversity of citizenship between the litigants." *Id.* at 753.

That analysis has no application here, however, because the hybrid DFR suit is a creature of federal common law. Thus, there is no danger of "inequitable administration," as there was in *Walker,* because a hybrid suit cannot be pursued differently in the federal courts and the NLRB. Indeed, the breach of contract half of the hybrid suit (*i.e.*, the section 301 claim against the employer) cannot be presented to the Board at all, *NLRB v. C & C Plywood Corp.,* 385 U.S. 421, 427 (1967), and this Court has yet to resolve the question whether the NLRB may enforce the DFR even against unions alone. *See Vaca v. Sipes,* 386 U.S. 171, 186 (1967). Accordingly, there is no danger that litigants could pursue a cause of action in federal court which had already been extinguished in the forum provided by the authority that created the cause of action, especially because the DFR remedy was not created by Congress or the NLRB, but was fashioned by this Court.

Respondent Conrail also invokes the legislative history of Federal Rules 3 and 4, citing excerpts which acknowledge a concern about whether those Rules could supersede statutes of limitations for *state* causes of action that require service within the limitations period. Conrail Br. at 10, 12. But the reason for that concern was that the Rules Enabling Act, 28 U.S.C. § 2072, forbids the enactment of rules that affect "any substantive right"; if the creator of a cause of action has determined that the substantive right should be limited to a certain period, including service within that time period, then a rule to the contrary might "abridge" the defendant's substantive right to timely notice. Thus, as Judge Hand stated in *Bomar v. Keyes,* the Rules would not excuse service outside the limitations period if such a requirement were "annexed as a condition to the very cause of action created." 162 F.2d at 140-141. Accordingly, although the drafters of Rules 3 and 4 recognized that the Rules would be construed so that "filing" and not "service" satisfied the statute of limitations, they were careful to warn against that result "if the law provides" otherwise. *See* excerpts quoted in Conrail Br. at 12.

In the hybrid suit, however, the creator of the cause of action – *i.e.,* this Court in *Steele v. Louisiana & Nashville RR,* 323 U.S. 192, 198-199 (1944); *Vaca v. Sipes, supra,* and similar cases – has made no express provision for any limitations period for the enforcement of that right, let alone for the time of service. Indeed, it is because of the lack of express direction on the limitations question that this Court had to grapple with the question twice, first in *UPS v. Mitchell,* 451 U.S. 56 (1981), and then in *DelCostello v. Teamsters,* 462 U.S. 151 (1983), before coming to the conclusion that it should borrow a statute of limitations for filing administrative complaints about unfair labor practices. Accordingly, there is no need to be

concerned about the Rules abridging substantive rights in DFR suits, *Sentry Corp. v. Harris,* 802 F.2d 229, 234 (7th Cir. 1986), and there is no reason not to continue to apply the traditional reading of the rules for federal causes of action.

Respondent union, unlike respondent employers, concedes that Rule 3 is the source of a normal federal rule that service is not required within the limitations period. Br. at 16. However, it would limit that rule to cases in which the statute of limitations uses magic words such as "brought" or "commenced." *Id.* at 16-18. But, according to the union, where the requirement of service is specifically included in the statute of limitations itself, that requirement must be borrowed as well. The union finds support for this argument by analyzing various decisions that applied the normal rule, showing that the borrowed statutes of limitations themselves used the magic words. The union concludes that the courts were free to disregard the service requirement only because it was in other state rules, rather than the statute of limitations, that the magic words were defined to require service as well as filing. *Id.* at 17 n.9.

But it can scarcely be a sensible rule that a borrowed limitations period will only require service within the stated period if the requirement appears within the same sentence or the same subparagraph of the state code. After all, if there is a state statute providing that actions are begun only when the defendants are served, a limitations statute that requires "commencement" within a given period will have been understood by its drafters to have incorporated the service requirement as well. Accordingly, although the union's argument purports to be more limited, its distinction is non-existent, or at least based on reasons that lack any substantial basis. At most, the "uniform" federal rule that filing the complaint with

the court satisfies the statute of limitations would apply only in the very unusual case in which Congress has specified a statute of limitations and that statute does not address the question of service. By eliminating a truly uniform rule, the union's analysis would unnecessarily increase the complexity of the procedures for litigating federal question cases in the federal courts, contrary to the objective of the Federal Rules.

Finally, all respondents assert that the application of Rule 3 would be inconsistent with several of this Court's decisions applying 42 U.S.C. § 1988, which requires the courts to apply the common or statutory law of the states in deciding civil rights claims unless those state rules are inconsistent with federal law. Accordingly, the Court has held that, unless federal interests at stake called for a different result, state rules governing the tolling of statutes of limitations should normally be borrowed along with the length of the limitations period to govern federal claims, including those under the civil rights laws. *E.g., Wilson v. Garcia,* 471 U.S. 261, 269 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Board of Regents v. Tomanio,* 446 U.S. 478 (1980); *Johnson v. REA Express,* 421 U.S. 454 (1975).

But, as painstakingly explained in a recent Seventh Circuit decision, these decisions do not overturn the traditional application of Rule 3. *See generally Sentry Corp. v. Harris,* 802 F.2d 229, 235 *et seq.* (1986). The additional state rules that were to be borrowed all involved extra periods of time that might or might not delay the time within which the suit had to be "filed" or "commenced." *E.g., Wilson,* 471 U.S. at 270, n.21, *quoting Tomanio,* 446 U.S. at 488; *Johnson,* 421 U.S. at 461, 463; *Burnett,* 468 U.S. at 52 n.14 (*DelCostello* borrowed "the limitations period fixed by § 10(b) . . . for filing unfair labor practice

claims"). Thus, each of these cases called for the borrowing of state rules that determine how the length of time included in the limitations should be computed, not what the plaintiff must do in federal court in order to satisfy the statute of limitations in federal question cases.

Nor has the Court uniformly borrowed all state rules related to limitations periods. Indeed, although state rules governing the manner in which defendants must be served will often reflect judgments about the balance between the importance of the underlying claims and potential defendants' need for repose, this Court has not hesitated to hold that the Federal Rules govern the manner in which process must be served, even in diversity cases. *Hanna v. Plumer* 380 U.S. 460, 462-463 n.1 (1965). Thus, in federal question cases – and particularly in cases in which the federal cause of action was created, not by Congress, but rather by this Court as a matter of federal common law – the Court need not defer to section 10(b)'s provision for complying with the limitations period for administrative charges as if it represented, by analogy, a legislative judgment about how plaintiffs should be required to satisfy the statute of limitations in hybrid DFR suits. Instead, it should follow the normal rule, traditionally inferred by the federal courts from Rule 3, that filing the complaint with the Court satisfies the statute of limitations in federal question cases.

2. Application of the Normal Rule Would Permit the Enforcement of the DFR Without Harming the Interest in Labor-Management Stability That Underlay DelCostello.

Petitioner's opening brief argued that, because of the differences between administrative procedures and federal court litigation, the balance of interests served by section

10(b)'s requirement that administrative charges be served within the limitations period would be distorted if that requirement were borrowed for hybrid DFR litigation. Thus, on the one hand, it can be significantly more difficult for federal court DFR plaintiffs to effect service on defendants who may wish to be uncooperative than for charging parties to serve NLRB charges, while on the other, to allow service to be accomplished pursuant to the federal rules after the complaint is filed would not substantially burden the interests of defendants.

Respondents take issue with these arguments on both sides of the balance, arguing first that requiring service within the limitations period would not substantially burden the DFR plaintiff, and second that permitting service after satisfying the statute of limitations would seriously threaten their interest in repose. Before demonstrating that each of these contentions is incorrect, we must reply to respondent union's argument that, in making arguments based on the "substantial shortening of the time period within which DFR complaints must be filed, petitioner assumes an *a priori* answer to the very question that is in dispute here." Br. at 19. It is of course true, as the union observes, that adoption of one rule or the other will either have the effect of increasing or decreasing the effective time period within which suits must be filed; that observation undercuts not only petitioner's arguments about the effect of rule-selection on enforcement of DFR rights, but also respondents' counter-arguments about its effect on the policies of repose. *See infra* at 13-15.

But the question that must be resolved is, what timeliness rules should be used in order to best serve the various interests at stake in the hybrid suit? Are those policies best served by applying the service requirement to

hybrid litigation, or is the administrative context, in which a service requirement reflected a proper balancing, different enough from federal court litigation as to warrant a different rule about what is required within the six-month period? That inquiry does not, as the union argues, involve the Court in a "judicially [un]manageable task." Br. at 20. The Court need only focus on the differences in the two types of procedures, and their different effects on both sides of the balance, in deciding whether the balance adopted by Congress in section 10(b)'s service requirement should be employed in hybrid litigation.

Turning now to the burden on the employee plaintiff caused by the service requirement, respondents criticize petitioner's contention, Pet'r Br. at 19, that requiring service within six months gives DFR defendants a strong incentive to refuse or evade service. Respondents argue that employers and unions must maintain a public presence in order to do their jobs, and point to the fact that, in this case, all defendants returned acknowledgement forms under Rule 4(c)(2)(C). But the question is not what these respondents did here (possibly based on their confidence that the limitations period had already elapsed), but whether the Court should adopt a rule that will give all potential DFR defendants an incentive to make service difficult for DFR plaintiffs.

Although it is relatively simple to effect service on an employer, if necessary through the Secretary of State or the registered agent, unions are unincorporated associations that cannot be served in that manner. Moreover, although union agents must come to the workplace and to union meetings, process servers cannot walk into the premises to find them; moreover, many unions do not authorize their line officials or office employees to accept service

of process. *E.g.*, Teamsters 1986 Constitution, Article XXIV. Finally, those few officers who are authorized to accept service would have every reason to make themselves unavailable for service, for as long as possible, if delayed service meant expiration of the statute of limitations. Although there is less reason for concern about a potential defendant's ability to delay service for several weeks when the statute of limitations is measured in years, it can make a world of difference when only six months is allowed.[1]

Respondent union also suggests that, *if* the courts follow the NLRB's rule that service of the charge is effective upon mailing, whether or not the proper union or corporate official is present to accept service when the letter carrier arrives, then plaintiffs would be under no greater burden than a charging party before the NLRB. Br. at 19 n.13. However, the union argues elsewhere both that it is entitled to *receive* notice within the six months (which is not what the NLRB's rules provide), Br. at 13, and that it is unnecessary to decide that issue here because the issue is not squarely presented. Br. at 9 n.4. The employers join the union in arguing that they are entitled to receive notice within the six-month period, Conrail Br. at 12, New Jersey Transit Br. at 8, but differ in that they argue strenuously against the adoption of any of the NLRB timeliness rules except the service requirement.

Admittedly, adoption of the NLRB's mailing rule would lessen the force of petitioner's argument pertaining to the burden on DFR plaintiffs. However, despite that advantage, there are other, countervailing disadvantages described in our opening brief at pages 21 to 23, and the best solution is to follow the normal federal rule instead of plunging the courts into the details of NLRB practice. But more fundamentally, we cannot agree that the Court should defer decision on the extent of the adoption of the Board's timeliness rules under section 10(b). First, if the reason for borrowing the service requirement is that the Court has concluded that, in light of the NLRB's mailing regulation, the service rule will not unduly burden enforcement of the DFR, the Court should explain that this is the basis for its ruling. If, by contrast, the Court concludes that the Board's mailing regulation should not be borrowed, then there remains the problem that DFR plaintiffs may be unduly burdened. Second, if the service rule of section 10(b) is adopted here, the mailing issue, as well as the other incorporation issues under section 10(b), such as deference to other Board rulings in this area, will have to be litigated in the lower courts, and ultimately resolved by this Court. We urge the Court not to leave these issues dangling, but to resolve them so that the lower courts need not be consumed with still more procedural litigation about the time limits in DFR cases.

Furthermore, given the respondents' unanimous insistence that the service requirement be borrowed in order to ensure the implementation of Congress' balance between the policies of repose and the importance of the underlying rights, *supra* at 6-7, it is truly remarkable how insistent the respondent employers are that the other NLRB rules governing timeliness not be imported into the litigation of hybrid suits in federal court. Conrail Br. at 18; New Jersey Transit Br. at 16. Although such NLRB rules are as much a reflection of policy judgments about limitations periods and the notice function of a complaint

[1] Respondent union also suggests that, because defendants who refuse to acknowledge mailed service under Rule 4(c)(2)(C) may be assessed the costs of effecting alternate service, plaintiffs in hybrid cases are unlikely to encounter substantial service problems. Br. at 19-20, n.13. However, if a defendant concludes that, by refusing service, it can escape litigation on the merits, it will likely regard the extra few hundred dollars in service costs as a small price to pay.

as were the tolling issues in *Tomanio* and similar cases, respondents' reluctance to live with the logical consequence of their argument is understandable. After all, some of the Board's timeliness rules, such as the mailing rule, or the rule that a complaint about several employees' discharges relates back to a charge that mentions only one employee's discharge, Pet'r Br. at 22, reflect a balancing of policies that is distinctly less favorable to potential DFR defendants than the service requirement. However, there is no basis for picking and choosing among rules to be borrowed depending on whether they favor plaintiffs or defendants.

In order to avoid the borrowing of the Board's rules that are less favorable to its interests, New Jersey Transit argues that NLRB interpretations of the statute need not be borrowed along with the statute's express requirements, and that in any event it is the NLRB that must follow the courts, not the courts that must follow the Board. Br. at 16. But, when state limitation and tolling periods are borrowed, this Court has long considered itself bound by state court interpretations as well as by the explicit language of the state statutes. *E.g., Cope v. Anderson,* 331 U.S. 461, 466-468 (1947); *Barney v. Oelrichs,* 138 U.S. 529, 532-536 (1891). Moreover, although the courts do have the final word on whether interpretations of the NLRA are reasonable, they are bound to respect the discretion of the NLRB as it uses its unique expertise about the realities of labor relations and litigation to interpret that NLRA. *E.g., Pattern Makers League v. NLRB,* 473 U.S. 95 (1985). Finally, the courts have long approved many of the Board's timeliness rules, including its unusual rule about which claims relate back to the original charge. *See Radio Officers Union v. NLRB,* 347 U.S. 17, 34 n.30 (1954).

Under the reasoning of *Tomanio,* the federal courts

would have to first ascertain the Board's timeliness rules, and then apply their myriad details, and potential defendants would have to accept the unfavorable as well as the favorable parts of those rules. The only way to stop DFR litigation from beginning a slide down that slippery slope is to adopt petitioner's position, that what the Court borrowed in *DelCostello* was only the six-month period, and that the normal federal rule about what constitutes "commencement" of the federal action should apply to DFR suits such as this.

With respect to the burdens imposed on hybrid suit defendants by the application of the normal federal rule, respondents each assert that application of Rule 4(j) of the Federal Rules of Civil Procedure would permit defendants to be sued even though they did not receive service as late as four months after the statute of limitations expired (a total of ten months after the cause of action accrued). Respondents argue that unions and employers need to be able to rely on grievance settlements as establishing the law of the shop if they do not receive actual notice of a challenge within six months; to rule otherwise, they contend, would recreate the very uncertainty that the decision in *DelCostello* was designed to avoid. Union Br. at 13-14; Conrail Br. at 17; New Jersey Transit Br. at 6-7.

The fundamental flaw in this argument is that it falsely assumes that, under their proposal, potential DFR defendants will receive notice of suit six months after the relevant transaction occurs and that all their worries will then be over. But DFR defendants usually will not clearly recognize when the cause of action accrued, and thus when the six-month period began to run. Although in the case of most unfair labor practices, such as a discharge, it will be clear when the alleged violation took place, the violations in hybrid suits are by no means so neatly defined. The

claim in a hybrid suit does not accrue when the discharge takes place, but rather when "the grievance procedure was exhausted or broke down to the employee's disadvantage." *E.g., Proudfoot v. Seafarers,* 779 F.2d 1558, 1559 (11th Cir. 1986).

If a grievance was fully arbitrated to a decision, it is easy to pinpoint the starting date; but if it is a matter of the union failing to process a grievance, or proceeding with it in a half-hearted way, the statute only begins to run when a reasonable employee would have known that the union had abandoned his interests. *E.g., Scott v. Teamsters Local 863,* 725 F.2d 226, 229-231 (3d Cir. 1984); *Metz v. Tootsie Roll Industries,* 715 F.2d 299, 304 (7th Cir. 1983); *Santos v. Carpenters,* 619 F.2d 963, 969-973 (2d Cir. 1980). In this case, the grievance procedure dragged on for more than two years following petitioner's discharge — more than four times as long as the limitation period itself — before it "broke down to [West's] disadvantage." *Proudfoot, supra.* Moreover, the statute does not run while the employee is exhausting intra-union remedies, a process about which the employer may have no knowledge. *See Frandsen v. BRAC,* 782 F.2d 674 (7th Cir. 1986), where the exhaustion of intra-union remedies took eighteen months, or three times the limitation period itself. In these circumstances, it rings more than a little hollow for respondents to claim that industrial stability is threatened if the union or employer must wait a single day longer than six months after the claim accrued to receive a summons stating that a complaint has been timely filed against it.

Moreover, a discharged worker has every reason to seek to effect service as soon as possible, once he has hired a lawyer and filed suit, because only at that point can he

hope to obtain reinstatement and backpay as redress for his claimed violations of his rights. Thus, as a practical matter, the possibility that the delay in receipt of service could theoretically be as long as four months cannot justify a departure form the normal rule that filing the complaint with the court is sufficient to satisfy the statute of limitations. In sum, the balance of the interests and burdens in the context of the hybrid DFR action clearly favors adoption of the normal practice pursuant to Rule 3, not the additional service requirement for unfair labor practice charges under section 10(b).

CONCLUSION

The judgment of the Court of Apperals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

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